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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HEUBLEIN, INC., a Connecticut corporation,

Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. May a state immunize from constitutional challenge a tax on alcoholic beverages, which discriminates against interstate commerce by imposing a higher tax on out-of-state products in violation of the Commerce Clause and the Equal Protection Clause, by recharacterizing the discriminatory tax with a legislative declaration of purpose purportedly related to the Twenty-first Amendment?

2. May a state tax on alcoholic beverages that discriminates against interstate commerce in violation of the Commerce Clause and the Equal Protection Clause be upheld as an exercise of the state's powers under the Twenty-first Amendment merely because it contains a legislative assertion that its purpose is to defray increased costs of regulating out-of-state products?

PARTIES AND COMPANIES RELATED TO APPELLANT

All parties to the proceeding in the Georgia Supreme Court are listed in the caption of the case in this Court. The parent company of Appellant Heublein, Inc. ("Heublein") is Grand Metropolitan PLC. The subsidiaries of Heublein, other than wholly owned subsidiaries, are All Brand Importers, Inc.; Boulevard Distillers and Importers, Inc.; Disport, S.A.; Heublein Industria e Comercio, Ltda.; Heublein do Brasil Comercial e Industrial, Ltd.; Compania Benvori de Produtos Alimenticios; Drury's Amazonica, S.A. Agro Industrial; Dreher S.A. Vinhos e Champanhas; Heublein (Japan) Limited; Heublein, S.A. de C.V.; J. M. da Fonseca-Exportador, Lda.; J. M. da Fonseca, Internacional-Vinhos, Limitada; JVC Development Company, Inc.; Madera Glass Company; and Ste. Pierre Smirnoff Fls. (Canada) Ltd. There are no affiliates of Heublein.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties and Companies Related to Appellant	i
Table of Contents	ii
Table of Authorities	iv
Citations to Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
The Questions Presented Are Substantial	9
I. Sections 3-4-60 and 3-6-50 of the Georgia Code violate established principles of the Commerce Clause and Equal Protection Clause	12
A. The Georgia taxes on alcoholic beverages constitute simple economic protectionism, which is *per se* unconstitutional under the Commerce Clause	12
B. The Georgia alcoholic beverage taxes are purely and completely discriminatory and violate the Equal Protection Clause	16
II. The asserted Twenty-first Amendment purpose of the taxes is insubstantial and does not outweigh the strong and direct Commerce Clause and Equal Protection Clause interests	18
The Georgia Supreme Court, which failed to scrutinize the asserted legislative purpose, erred in upholding the taxes on the basis of the unsubstantiated, pretextual statement of purpose	18
III. A discriminatory state taxing scheme is not entitled to any special immunity merely because the taxes involve alcoholic beverages	26
Conclusion	27

	PAGE
Appendix	A-1
Opinion of the Georgia Supreme Court	A-1
Order of the Superior Court on Motion for Preliminary Injunction	A-12
Judgment of the Superior Court	A-16
Order of the Superior Court on Motion for Reconsideration	A-23
Judgment of the Georgia Supreme Court	A-25
Notice of Appeal	A-26
Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50	A-30
Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50 (1982)	A-31
House Bill No. 463	A-32
House Bill No. 564	A-35

TABLE OF AUTHORITIES

PAGE

Cases

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).... 5, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 26

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)..... 23

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 13

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080 (1986) 9, 14, 15, 23, 26

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 17, 25, 26

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 25, 26

Craig v. Boren, 429 U.S. 190 (1976) 8, 17, 18

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 21, 22

Edgar v. MITE Corp., 457 U.S. 624 (1982)..... 23

Heublein, Inc. v. State, 351 S.E.2d 190 (Ga. 1987) 8, 10, 14, 15, 18, 27

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).....11, 12, 26

Hughes v. Oklahoma, 441 U.S. 322 (1979) 21, 22, 23

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)..... 22

Lacoste v. Louisiana Department of Conservation, 263 U.S. 545 (1924) 22

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 13

Maine v. Taylor, 106 S. Ct. 2440 (1986) 16

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 17, 18, 21

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 13

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 13

PAGE

Philadelphia v. New Jersey, 437 U.S. 617 (1978).13, 14, 16, 23
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)..... 14
Shafer v. Farmers Grain Co., 268 U.S. 189 (1925)..... 23
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 23
State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936) 26
324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987)..... 9, 26

Constitutional Provisions

U. S. Const. art. I, § 8, cl. 3 2
U. S. Const. amend. XIV, § 1 2
U. S. Const. amend. XXI, § 2 3

Statutes

28 U.S.C. § 1257(2) 2
28 U.S.C. § 2101(c) 2
U.S. Sup. Ct. R. 10 2
U.S. Sup. Ct. R. 11 2
U.S. Sup. Ct. R. 15.1(f) 3
Official Code of Ga. Ann. § 3-2-10 ..... 19, 25
Official Code of Ga. Ann. § 3-4-60 .....3, 5, 20
Official Code of Ga. Ann. § 3-6-50 .....3, 5, 6
Official Code of Ga. Ann. § 48-2-35(a) 19, 25
Official Code of Ga. Ann. § 3-4-60 (1982) 3, 5, 20
Official Code of Ga. Ann. § 3-6-50 (1982) 3, 5, 6

Other Authorities

Ga. H.B. No. 463, 1985 Ga. Laws 662 3
Ga. H.B. No. 564, 1985 Ga. Laws 665 .....3, 6, 18, 19, 20, 21
1937-38 Ga. Laws Ex. Sess. 115 4
1937 Ga. Laws 851 4
1935 Ga. Laws 492 4

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JURISDICTIONAL STATEMENT

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is not yet reported officially. It is reported unofficially at 351 S.E.2d 190. A copy of the opinion is contained in the Appendix at page A-1.

The opinions of the Superior Court of Fulton County, Georgia are not reported. Copies of the opinions are contained in the Appendix at pages A-12, A-16, and A-23.

STATEMENT OF JURISDICTION

This is a proceeding for declaratory and injunctive relief brought by Appellant Heublein against Appellees the State of Georgia and the State's taxing authorities. Heublein claims that Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50, which

impose a discriminatory tax on out-of-state producers of alcoholic beverages, violate the Commerce Clause and the Equal Protection Clause of the United States Constitution.

On May 12, 1985, the Superior Court of Fulton County, Georgia denied Heublein's prayer for injunctive relief. On September 23, 1985, that court entered an order and judgment rejecting Heublein's constitutional claims and denying declaratory relief. On November 20, 1985, the superior court denied Heublein's motion for reconsideration of the order and judgment of September 23, 1985.

On January 7, 1987, the Supreme Court of Georgia affirmed the judgment of the superior court. A notice of appeal of this judgment was timely filed in the Supreme Court of Georgia on April 6, 1987, pursuant to U.S. Sup. Ct. R. 10 and 11 and 28 U.S.C. § 2101(c).

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1257(2) because this case questions the validity of state statutes on the ground that they violate the United States Constitution, and the decision of the highest court of Georgia is in favor of the statutes' validity.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the United States Constitution, article I, section 8, clause 3, provides in part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States.

The Equal Protection Clause of section 1 of the Fourteenth Amendment to the United States Constitution provides in part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 2 of the Twenty-first Amendment to the United States Constitution provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The statutes involved in this case are lengthy. Pursuant to U. S. Sup. Ct. R. 15.1(f), the text of each statute is set forth in the Appendix at the following pages:

Official Code of Ga. Ann. § 3-4-60 (A-30);

Official Code of Ga. Ann. § 3-6-50 (A-30);

Official Code of Ga. Ann. § 3-4-60 (1982)(repealed by 1985 Ga. Laws 662) (A-31);

Official Code of Ga. Ann. § 3-6-50 (1982)(repealed by 1985 Ga. Laws 662) (A-31);

House Bill No. 463, 1985 Ga. Laws 662 (A-32);

House Bill No. 564, 1985 Ga. Laws 665 (A-35).

STATEMENT OF THE CASE

Heublein is a manufacturer and importer of alcoholic beverages, engaged in interstate commerce throughout the United States. Heublein ships and sells alcoholic beverages manufactured outside the State of Georgia to licensed wholesalers in Georgia, as well as wholesalers located in all of the other states in the United States. As a condition of doing business in Georgia, Heublein is required to pay the taxes imposed by Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50, as well as separate license fees.

In this case, Heublein sought an injunction restraining the State of Georgia and its taxing authorities from collecting the taxes imposed by these statutes and a declaration that the statutes violate the Commerce and Equal Protection Clauses of the United States Constitution. On its face, the legislation bestows a substantial commercial advantage on Georgia producers of alcoholic beverages and grossly discriminates

against out-of-state producers. Indeed, the tax imposed on out-of-state producers is from two times greater (for distilled spirits and alcohol) to four times greater (for wines) than that imposed on local producers.

The taxes challenged by Heublein are codified in those articles of the Georgia Alcoholic Beverages Code that govern "Excise Taxation." The taxes are levied on the goods themselves, based on the volume of alcoholic beverages sold. The discrimination against out-of-state producers is achieved by splitting the taxes into two portions, one portion imposed on all alcoholic beverages wherever produced and an additional portion imposed only on out-of-state products. For example, Official Code of Ga. Ann. § 3-4-60 imposes upon distilled spirits produced within the State of Georgia an "excise tax" of fifty cents per liter. The statute imposes upon distilled spirits produced outside the State of Georgia the same "excise tax" plus an additional "import tax" of fifty cents per liter. Thus, a tax of $1.00 per liter is imposed on imported distilled spirits. Whether alcoholic beverages are domestic or imported, the taxes are imposed and collected in the very same manner, with the exception that out-of-state producers must pay the discriminatory rates.

The Georgia taxes on alcoholic beverages, as presently written, were enacted effective April 1, 1985. Prior to March 1985, indeed since the taxes were originally enacted in the 1930's, Georgia employed a taxing scheme that discriminated against out-of-state producers and granted to local producers and producers of alcoholic beverages manufactured from Georgia-grown products a substantial advantage. As is apparent from the terms of the legislation originally enacting the discriminatory rates, the express purpose of the discrimination was to benefit local manufacturers that made alcoholic beverages from Georgia-grown products. 1937-38 Ga. Laws Ex. Sess. 115, 117 (alcohol and distilled spirits); 1937 Ga. Laws 851, 853-54 & 1935 Ga. Laws 492 (the original purpose of the discrimination against "foreign wines" was "to foster and encourage the growing of grapes, fruits and berries

on Georgia farms" and "to exempt from all taxation wines made . . . by producers in Georgia of such crops").

In response to this Court's decision in *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), striking down such discriminatory taxes under the Commerce Clause, the Georgia taxes on alcoholic beverages were rewritten. Effective March 31, 1985, when Georgia House Bill No. 463 was approved, Georgia repealed its discriminatory taxing scheme and provided for a uniform tax on all alcoholic beverages, whether produced outside the State or within the State. Just one day later, however, that legislation was itself repealed by the enactment of Georgia House Bill No. 564.

The codifications of House Bill No. 564 are the laws challenged in this case. The Georgia legislature, in enacting House Bill No. 564, reinstated the discriminatory taxing scheme of former sections 3-4-60 and 3-6-50. In substance, the rewritten taxing scheme is the same as former sections 3-4-60 and 3-6-50. In fact, the tax rates currently imposed by the statutes on in-state and out-of-state products for each category of alcoholic beverages covered by the statutes are exactly the same rates as those imposed by the statutes before their amendment.[1]

---

[1] Under both the present statutes and former statutes, locally produced distilled spirits are taxed at fifty cents per liter, and locally produced alcohol is taxed at seventy cents per liter. *Compare* Official Code of Ga. Ann. § 3-4-60(1), (3) *with* Official Code of Ga. Ann. § 3-4-60(2) (1982). Distilled spirits and alcohol manufactured outside Georgia are taxed at $1.00 and $1.40 per liter. *Compare* Official Code of Ga. Ann. § 3-4-60 (1)-(2) *with* Official Code of Ga. Ann. § 3-4-60(1) (1982).

Georgia table wines are taxed at eleven cents per liter, and non-Georgia table wines are taxed at forty cents per liter. *Compare* Official Code of Ga. Ann. § 3-6-50(a) *and* Official Code of Ga. Ann. § 3-6-50(1)(A) (1982) *with* Official Code of Ga. Ann. § 3-6-50(a)-(b) *and* Official Code of Ga. Ann. § 3-6-50(1)(B), (2) (1982). Domestic dessert wines are taxed at twenty-seven cents per liter, and out-of-state dessert wines are taxed at sixty-seven cents per liter. *Compare* Official Code of Ga. Ann. § 3-6-50(c) *and* Official Code of Ga. Ann. § 3-6-50(3)(A) (1982) *with*

(footnote continued on next page)

The sole distinguishing characteristic between the former and current discriminatory statutes is a rewritten statement of purported legislative intent. The Georgia legislature stated in a caption to House Bill No. 564 that the purpose of the amendment was "to provide for the increased cost of administration and collection of revenues . . . [and] to promote temperance." 1985 Ga. Laws 665. The legislature purported to "find" that the asserted purpose of providing for increased costs would be furthered by the discriminatory taxes reenacted. *Id.* § 1. However, this purported purpose was not supported by any hearings, reports, testimony, or other facts. No taxes were in fact increased to cover the allegedly increased costs, and there is nothing in the statutes, the legislative history, or the record in this case to support any correlation between the amount of the taxes and the asserted costs of regulating imports. Furthermore, the revenues collected from the taxes are not earmarked for the administration or regulation of alcoholic beverages. All of the taxes imposed by sections 3-4-60 and 3-6-50 are paid into the general revenue fund of the State, not into a fund for the regulation of alcoholic beverages, whether imported or not.

Passing on the constitutionality of the taxes, the superior court declined to find or to hold that the intended purpose of the legislation was to further temperance, or that the legislation actually achieved that end. Indeed, the superior court concluded that it was:

> a myth that [the tax] was going to promote temperance. . . . I can't see that temperance by any stretch of the rationale could be a legislative intent that could be sustained by the Courts in a logical way. [Transcript, September 20, 1985, at 15, 17.]

(footnote continued from preceding page)

Official Code of Ga. Ann. § 3-6-50(c)-(d) *and* Official Code of Ga. Ann. § 3-6-50(3)(B), (4), (5) (1982).

Additionally, all alcoholic beverages covered by the statutes are taxed proportionately at the applicable rate on all fractional parts of a liter.

In the superior court, Heublein conclusively established the discriminatory effect of the Georgia alcoholic beverage taxes. In fact, Appellees conceded, both in the superior court and on appeal, that the taxes violate the Commerce Clause. To justify the violation, the State relied solely on the unsupported declaration of legislative purpose contained in House Bill No. 564. The State, however, possessed no evidence to support its assertion that the purpose of the statutes was to defray regulatory costs, that any stated purpose of the statutes could even be furthered by the legislation, or that the purpose could not be furthered by alternative means that do not discriminate against interstate commerce. In short, Appellees had no evidence to dispute Heublein's claim that the taxes constitute unconstitutional economic protectionism.

Despite its own rejection of the asserted purpose of promoting temperance, and despite the State's inability to justify the discriminatory taxes, the superior court found it unnecessary even to analyze Heublein's Commerce Clause and Equal Protection Clause arguments. Instead, the court held that it was required to accept the legislative declaration of purpose and "findings" under the principle that "[i]f under any possible state of facts an act would be constitutional, the Courts are bound to presume that such facts exist." A-18. Though there were no legislative findings, studies, or substantiation of any kind, the court concluded that the declaration that administrative and regulatory costs were higher for imported alcoholic beverages than for local products was "an express legislative finding that the legislation was designed to carry out a central purpose of the Twenty-first Amendment." *Id.* Reading *Bacchus* as holding that the statutes must be upheld so long as the State "does '*seek* to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment,' " *id.* at A-19 (emphasis added) (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 276), the court rejected Heublein's Commerce Clause claim.

Similarly, the court rejected Heublein's Equal Protection Clause claim on the ground that economic regulation "merits only the 'mildest review' under the Fourteenth Amendment." A-20 (quoting *Craig v. Boren*, 429 U.S. 190, 207 (1976)). In effect, the court held that a bare legislative assertion that the purpose of a discriminatory tax is related to the Twenty-first Amendment is sufficient to immunize the tax from judicial review under the Commerce Clause or the Equal Protection Clause.

The Supreme Court of Georgia, by its silence, apparently agreed with the superior court that temperance was not a purpose that the challenged legislation sought to promote. Without any analysis of Heublein's Commerce Clause and Equal Protection Clause claims, the court focused on the purported purpose of the legislation of "defraying the increased costs of regulating the importation into this state of intoxicating liquors." *Heublein, Inc. v. State*, 351 S.E.2d 190, 196 (Ga. 1987). The court held that this purpose implicates a central concern of the Twenty-first Amendment and thus found no error in the superior court's decision. So too, the Georgia Supreme Court summarily rejected the Equal Protection Clause claim, holding that the taxes were economic regulation entitled to only the "mildest review" and that the taxes were rationally related to regulating importation of intoxicating liquors. *Id.* As had the superior court, the supreme court considered Heublein's constitutional challenges to be foreclosed by a bare legislative statement of purpose.

The questions presented by this appeal were raised by Heublein from the outset of this case, as they were the basis for Heublein's complaint. In the superior court, the questions were also raised in Heublein's motions for injunctive and declaratory relief, and in its motion for reconsideration of the court's judgment denying Heublein's claims. The questions were passed on by the superior court in its orders denying injunctive and declaratory relief and in its order denying Heublein's motion for reconsideration. A-12; A-16; A-23.

The questions were raised by Heublein before the Supreme Court of Georgia in Heublein's briefs and enumeration of errors before that court, and were passed on by that court in its decision of January 7, 1987, affirming the superior court's judgment. A-1.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents substantial questions concerning the supremacy of this Court in the exposition of constitutional law and concerning the binding effect of the decisions of this Court upon the states and their legislative, administrative, and judicial officers. Within these questions are important federal questions concerning commerce among the states, concerning the proper role of a state court in scrutinizing the purported purpose of legislation that discriminates against interstate commerce, and concerning the scope of federal and state interests in the regulation of alcoholic beverages.

In particular, the actions of the Georgia legislature and taxing authorities involved in this case, and the decision of the Supreme Court of Georgia from which this appeal is taken, are directly contrary to this Court's decision *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and to every subsequent decision of this Court to address the limits of the Twenty-first Amendment in respect to interstate commerce. *See 324 Liquor Corp v. Duffy*, 107 S. Ct. 720 (1987); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080 (1986). The challenged actions and decision are also at odds with every decision of this Court dealing with discriminatory state legislation. Furthermore, the Georgia Supreme Court's decision conflicts with the judgment of every state that has considered the constitutionality of discriminatory taxes on alcoholic beverages under the principles of *Bacchus*.

If this case is not reversed summarily based on the Georgia court's erroneous interpretation and application of *Bacchus*, then Heublein requests that the Court give this appeal plenary consideration to resolve the real and substantial conflict

between the Georgia court's decision and *Bacchus*, for to do otherwise would have the effect of overruling *Bacchus*. In *Bacchus*, this Court held that discriminatory state taxes on alcoholic beverages imported into a state were unconstitutional because they violated the Commerce Clause and were not supported by any clear concern of the Twenty-first Amendment. 468 U.S. at 276. Since the 1930's, Georgia has practiced the very kind of economic protectionism this Court struck down in *Bacchus*. The current Georgia statutes seek to perpetuate that unconstitutional discrimination by cloaking it in Twenty-first Amendment language. The legislation's purported purpose is insubstantial and unsupported by the record.

The mere declaration that a discriminatory taxing scheme is an exercise of the state's powers under the Twenty-first Amendment does not immunize the scheme from review under established principles of the Commerce Clause and Equal Protection Clause. A state may not ignore *Bacchus* and perpetuate an unconstitutionally discriminatory taxing scheme by the simple expedient of recharacterizing the taxes with a purported Twenty-first Amendment purpose. Furthermore, the mere assertion of an unsubstantiated legislative purpose will not save a discriminatory tax that clearly violates the Commerce Clause and Equal Protection Clause. This Court, in each of its decisions following *Bacchus*, has consistently confirmed these principles of constitutional construction.

In the present case, the Georgia Supreme Court disregarded the controlling authorities and effectively held that a discriminatory state tax on alcoholic beverages is *per se* valid whenever a state maintains that the tax was adopted pursuant to the Twenty-first Amendment. The court, solely on the basis of the erroneous and unsubstantiated conclusion that the challenged taxes implicate central concerns of the Amendment, determined that the Georgia taxing scheme is valid. *Heublein, Inc. v. State*, 351 S.E.2d 190, 196 (Ga. 1987). The

court failed to discuss the long-standing and substantial federal interests recognized by this Court in preventing discriminatory legislation, and failed to consider the State's asserted concerns under the Twenty-first Amendment in light of the principles of the Commerce Clause and Equal Protection Clause offended by the discriminatory Georgia taxes.

The Georgia Supreme Court failed to scrutinize the legislature's statement of purported purpose, even though Heublein presented convincing evidence that both of the asserted purposes were pretextual and could not possibly be served by the legislation, and even though the State had no support for the asserted purposes. Basing its decision solely on the Twenty-first Amendment, without any analysis of the balance between the Amendment and the Commerce and Equal Protection Clauses, the Georgia Supreme Court in essence held that the State of Georgia, merely by reciting a concern for the Twenty-first Amendment, may pass any law concerning alcoholic beverages no matter how repugnant to other basic constitutional principles. As this Court has consistently recognized since its early decisions following the adoption of the Twenty-first Amendment, the conclusion of the Georgia court is "patently bizarre and is demonstrably incorrect." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

Indeed, this Court reaffirmed in *Bacchus* that the Twenty-first Amendment did not operate to repeal other provisions of the Constitution:

> It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause. For example, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964), the Court stated:
>
> > "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors

> is concerned would, however, be an absurd oversimplification."
>
> We also there observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332.

468 U.S. at 275.

If this Court were to uphold the unsubstantiated claim of the Georgia legislature that it was acting under its Twenty-first Amendment powers in rewriting the Georgia taxes on alcoholic beverages, or to countenance the Georgia courts' refusal even to examine the legislature's claim, other states would be encouraged to adopt similar or still more discriminatory legislation. The principle of *Bacchus*, followed by every state to face the issue until the decisions of the Georgia courts in the present case, would become a nullity, and all states would be allowed to erect barriers against outside competition immune from judicial challenge. In short, the primary and central question presented to the Georgia courts and to this Court is whether or not a state excise taxing scheme, which on its face discriminates against interstate commerce in violation of established principles of the Commerce Clause and Equal Protection Clause, should be granted a special immunity merely because the state purports to have enacted the taxes under the Twenty-first Amendment.

I. Sections 3-4-60 and 3-6-50 of the Georgia Code violate established principles of the Commerce Clause and Equal Protection Clause.

A. The Georgia taxes on alcoholic beverages constitute simple economic protectionism, which is *per se* unconstitutional under the Commerce Clause.

This Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), provides the framework for analysis of Georgia's discriminatory taxes on alcoholic beverages.

According to the required analysis, the challenged taxes constitute virtually a *per se* violation of the Commerce Clause of the United States Constitution:

> A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' "

Id. at 268 (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

In *Bacchus*, the appellants challenged the constitutionality of a Hawaii tax *identical* in operation to Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50. The Hawaii statute imposed a 20% tax on sales of liquor at wholesale; however, certain alcoholic beverages made from locally grown products were exempted from the tax. 468 U.S. at 265. This Court held that the Hawaii tax was discriminatory and unconstitutional on its face.

In reaching the conclusion that the Hawaii tax was unconstitutional, this Court in *Bacchus* first considered whether the tax violated the Commerce Clause. If *either* the purpose *or* the effect of the tax is to discriminate in favor of local businesses or goods, then the legislation constitutes "simple economic protectionism" and is virtually *per se* invalid. *Id.* at 270. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). This Court in *Bacchus* nevertheless went on to consider the balance between competing federal interests in interstate commerce and state interests under the Twenty-first Amendment in determining that the Hawaii taxes could not be saved due to the plain violation of the Commerce Clause. 468 U.S. at 275-76.

According to these cases, if a state enacts legislation that does not regulate evenhandedly, but effectively discriminates against out-of-state products (or producers) solely because of their origin, the purpose asserted for the legislation is largely irrelevant.[2] The evil of protectionism may be found in the purpose or the effect of legislation, and if either is discriminatory, a strict rule of invalidity has been erected. *Philadelphia v. New Jersey*, 437 U.S. at 626. *See also Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080, 2084 (1986) (state's asserted Twenty-first Amendment interest, even if its legitimacy is not disputed, is irrelevant when a state statute constitutes protectionism because it directly regulates or discriminates against interstate commerce).

In *Bacchus*, examination of the legislature's purpose in enacting the Hawaii taxes was sufficient in itself to conclude that a strict rule of invalidity applied to the protectionist taxes rather than "a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce." 468 U.S. at 270. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). In the same way, examination of the effect of the Georgia taxes challenged in the present case is sufficient to demonstrate that the taxes constitute unconstitutional economic protectionism. In the superior court, Heublein established, and the State conceded, that Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50 have a discriminatory effect. Transcript, September 20, 1985, at 24. The State also conceded on appeal that "the State has made no attempt to deny or otherwise refute" that "the Georgia

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[2] It is this principle advocated by Heublein in the courts below that the State of Georgia intentionally misconstrued as Heublein's failure to challenge the purported purpose of the legislation at issue. *See Heublein, Inc. v. State*, 351 S.E.2d 190, 195-96 (Ga. 1987). Although it was not Heublein's burden, as demonstrated in Section II of this Jurisdictional Statement Heublein did indeed challenge the basis and legitimacy of the asserted legislative purpose.

statutes violate the Commerce Clause." Brief of Appellees, at 3.

Heublein strongly contends that the judicial inquiry and analysis of the challenged statutes need go no further once it is determined as in the present case that a discriminatory effect, and therefore protectionism, exists. *See Brown-Forman Distillers Corp v. New York State Liquor Authority,* 106 S. Ct. at 2084. On the other hand, should the Court elect to expand upon the analysis, it is clear that the long-standing federal interest in preventing discrimination in interstate commerce is far more substantial than the stated, but unsubstantiated, legislative purpose in this case. In fact, it is inconceivable that a pretextual statement of "purpose" could outweigh established federal interests under the Commerce Clause.

Instead of examining the effect of the challenged statutes, the Georgia Supreme Court observed that the Georgia legislature, in rewriting the taxes, had articulated a purpose for the legislation other than to promote local industry. *Heublein, Inc. v. State,* 351 S.E.2d 190, 196 (Ga. 1987). The court apparently concluded that if the legislature merely announces a purpose other than economic protectionism for reenacting legislation that discriminates against interstate commerce, regardless of the original protectionist purpose of the legislation, then the court's inquiry into the constitutionality of the legislation ends. This conclusion grossly misconstrues and oversimplifies *Bacchus.*

First, the motivation for the statute is immaterial to the primary question whether the Commerce Clause is violated because the undeniable and uncontroverted effect of the Georgia taxes is to discriminate against interstate commerce. "Contrary to the evident assumption of the state court," this Court's decisions on the Commerce Clause clearly hold that "the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate *aim*" of the challenged legislation is protectionist.

Philadelphia v. New Jersey, 437 U.S. at 626 (emphasis added).

Second, the Georgia Supreme Court failed to recognize that once Heublein had established, and the State conceded, a violation of the Commerce Clause, the burden was then on the State to assert *and* to support a justification for the challenged legislation. Just last Term, this Court reaffirmed that "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 106 S. Ct. 2440, 2448 (1986).

There is absolutely no evidence that the challenged taxes serve a legitimate state purpose. In attempting to justify the discriminatory taxes, Appellees merely recited the declarations in House Bill No. 564 of the purported legislative purposes for rewriting the taxes. It simply cannot be said that this Court's Commerce Clause teachings have ever hinged upon the crafty draftsmanship of a statement of legislative purpose such that the use of "magic words" could relieve a state from constitutional mandates. Yet this is the very notion upon which the State of Georgia relies in advancing its position in this case.

B. The Georgia alcoholic beverage taxes are purely and completely discriminatory and violate the Equal Protection Clause.

Settled principles under the Equal Protection Clause also establish that a state tax that discriminates against out-of-state companies is invalid and unconstitutional. Just as the Twenty-first Amendment "did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 275, it did not exempt from scrutiny under the Equal Protection Clause a state tax levied on alcoholic beverages. "Despite broad language in some of the opinions of this Court written

shortly after ratification of the Amendment," *id.* at 274, it is now clear that:

> important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot . . . insulate the liquor industry from the Fourteenth Amendment's requirement[ ] of equal protection, *Craig v. Boren*, 429 U.S. 190, 204-209 (1976).

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 108 (1980).

This Court recently analyzed the Equal Protection Clause principles applicable to the present case in its decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), striking down an Alabama statute that imposed a substantially greater tax on out-of-state insurance companies than on domestic companies. In *Metropolitan Life*, the state sought to uphold the discriminatory tax because it served the legitimate purposes of raising revenue and encouraging in-state business. Rejecting the asserted justifications for the tax, this Court held that neither of the purposes furthered by the tax was legitimate under the Equal Protection Clause. *Id.* at 883. While such purposes are "often admirable," under equal protection analysis they are not legitimate state purposes when furthered "by *discriminating* against foreign corporations." *Id.* at 879 (emphasis in original).

Like the taxes found unconstitutional in *Metropolitan Life*, Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50 are "purely and completely discriminatory" and constitute "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." 470 U.S. at 878. In accepting without inquiry the state purpose asserted in justification of the tax statutes, the Georgia Supreme Court effectively "eviscerate[d] the Equal Protection Clause" in the context of this case. *Id.* at 882. The court's decision, upholding the statutes "primarily on how a State framed its purpose," rested entirely on "a distinction without a difference," and one that this Court has firmly rejected in the context of both a Commerce

Clause and an Equal Protection Clause challenge to discriminatory state taxes. *Id.* (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 273).

Citing *Craig v. Boren*, 429 U.S. at 207, and overlooking *Metropolitan Life*, the Georgia Supreme Court simply avoided Heublein's equal protection challenge by stating that Heublein's claim merits "only the mildest review under the Fourteenth Amendment." *Heublein, Inc. v. State*, 351 S.E.2d at 196. In fact, *Craig v. Boren* supports exactly the opposite conclusion. Economic regulation such as a discriminatory state tax, including a tax on alcoholic beverages, is covered by the analysis employed in *Metropolitan Life*, and under this analysis the challenged statutes violate the Equal Protection Clause.

II. The asserted Twenty-first Amendment purpose of the taxes is insubstantial and does not outweigh the strong and direct Commerce Clause and Equal Protection Clause interests.

The Georgia Supreme Court, which failed to scrutinize the asserted legislative purpose, erred in upholding the taxes on the basis of the unsubstantiated, pretextual statement of purpose.

Notwithstanding the principles of the Commerce Clause and Equal Protection Clause offended by Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50, the State asserts that the statutes are constitutional because they were designed to promote purposes of the Twenty-first Amendment. These purported purposes are "to provide for the increased cost of administration and collection of revenues . . . [and] to promote temperance." 1985 Ga. Laws 665. The superior court had rejected the temperance rationale as mythical, and the supreme court did not disagree. Therefore, the supreme court had no basis for upholding the statutes other than the assertion that the statutes were rewritten to meet increased costs of regulating the importation of alcoholic beverages. *See Heublein, Inc. v. State*, 351 S.E.2d at 196. That assertion was unsubstantiated,

as the State had no legislative findings, studies, or evidence of any kind to support the assertion. Nor did the court make an independent examination of this purported legislative purpose, even though it was aware that the legislature had otherwise asserted something that was not the true reason for amending the statutes.

The record in this case shows that when the Georgia legislature rewrote sections 3-4-60 and 3-6-50, it failed to make any findings or studies about temperance, about costs of administration or collection of revenues, about increased costs associated with imported alcoholic beverages, or about any other purported purpose of the legislation. Instead, the tax rates that the legislature supposedly found necessary so that "the increased costs [would] be provided for by taxation," 1985 Ga. Laws 665 § 1, just so happened to be exactly the same rates set forth in the former unconstitutional statutes. The purported legislative purpose is equally suspect in light of the fact that the tax dollars generated by the discriminatory taxes find their way into the State's general revenue fund and are expended in ways wholly unrelated to the administrative costs of regulating the importation of alcoholic beverages. *See* Official Code of Ga. Ann. §§ 3-2-10; 48-2-35(a). Thus, it is evident that the Georgia legislature's course of conduct was to evade the constitutional mandate of this Court by creating a facade in the name of the Twenty-first Amendment.

Had the Georgia Supreme Court considered the peculiar history of Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50, it would have been clear that the rewriting of the statutes did nothing but reinstate the discriminatory taxing scheme of the former statutes, but cloaked the scheme in a new statement of supposed intent. Prior to March 1985, Georgia employed a taxing scheme that discriminated against out-of-state producers. Significantly, the predecessors to the challenged statutes either made no mention of the purpose behind their enactment, or contained an express protectionist purpose to foster local industries involved in the production of alcoholic beverages. The only purpose apparent from the face of the

former statutes was to benefit domestic producers and producers of alcoholic beverages made from Georgia-grown products, provisions carried over in the challenged statutes. *Compare* Official Code of Ga. Ann. §§ 3-4-60(2) (1982) (lower tax on distilled spirits "manufactured in this state from Georgia-grown products") *with* Official Code of Ga. Ann. §§ 3-4-60(3) ("[a]ll alcohol spirits manufactured within this state for sale within this state shall be made from Georgia grown products"; locally produced distilled spirits taxed at lower rate). Of course, this is precisely the sort of protectionist legislation that this Court found unconstitutional in *Bacchus*. 468 U.S. at 270-71.

Following the *Bacchus* decision, the Georgia legislature abolished the discriminatory taxes of former sections 3-4-60 and 3-6-50 when on March 31, 1985, House Bill No. 463 was approved and became effective. This bill imposed a uniform, evenhanded tax on all alcoholic beverages, whether imported into Georgia or produced in the State. In enacting House Bill No. 463, the Georgia legislature evidenced its awareness of the mandate of *Bacchus* that resident and nonresident producers of alcoholic beverages be treated equally and responded in much the same manner as have other states to that mandate. When it wrote this nondiscriminatory house bill, the Georgia legislature did not say anything about temperance, increased costs, or any other purported purpose. When House Bill No. 564 was enacted just one day after House Bill No. 463, these matters suddenly seemed of concern to the legislature, and purportedly for these reasons, the legislature reinstated the discriminatory taxes of the former statutes.

Clearly, any notion that out-of-state producers should not be the victims of protectionism was short-lived under the Georgia taxing scheme. The only discernible difference between the former statutes and the statutes as rewritten was "to provide for legislative intent." 1985 Ga. Laws 665. This difference was only a matter of form, and not of substance, and is a difference evidencing the legislature's recognition of

the constitutional infirmity of a discriminatory taxing scheme. Despite the purported purpose stated in House Bill No. 564 "to provide for the increased cost of administration and collection of revenues," *id.*, the bill did not actually increase any taxes to recover the allegedly greater costs. Furthermore, even had an increase truly been enacted, the discriminatory Georgia taxes could not be upheld. This Court in *Bacchus* found the Hawaii tax unconstitutional even though the tax originally had been enacted "to defray the costs of police and other governmental services that the Hawaii Legislature concluded had been increased due to the consumption of liquor." 468 U.S. at 265.

The Georgia Supreme Court's decision is a blatant violation of the established principle that a court faced with a constitutional challenge to discriminatory state legislation must closely examine a legislative statement of the purported purpose for enacting the legislation. Indeed, if the statement of purpose is a "*post hoc* rationalization" or is pretextual, the court should disregard it altogether. *See Hughes v. Oklahoma*, 441 U.S. 322, 338 n.20 (1979); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

In *Bacchus*, this Court stated that it was unnecessary to "guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry." 468 U.S. at 271. This Court based its conclusion upon an examination of the statement of purpose contained in the reports made by the Hawaii legislature when the legislation challenged in *Bacchus* was enacted. *Id.* at 270-71. Even in *Bacchus* this Court did not accept the legislature's statement of purpose at face value, but found it necessary to look beyond the articulated motivation of the legislature to conclude that the purpose of the legislation was discriminatory. This "form over substance" review is not novel. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. at 882. Although the Hawaii legislature's stated motivation was to aid local producers, not to harm out-of-state producers, this

Court concluded in *Bacchus* that a determination of constitutionality does not depend on the state's choice to focus on the party benefited rather than the party burdened by discriminatory legislation. Otherwise, there would seldom, if ever, be an occasion to find that a statute unconstitutionally discriminates. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. at 273.

In this regard, *Bacchus* perfectly illustrates the correctness of this Court's recognition that it is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. Madison,* 340 U.S. at 354. For this very reason, it is essential that a court invoke "the strictest scrutiny" of the purported purpose for enacting discriminatory legislation and of the absence of nondiscriminatory alternatives. *Hughes v. Oklahoma,* 441 U.S. at 337. Furthermore, a court should not limit its inquiry into the purpose of challenged legislation to "[t]he name, description or characterization given it by the legislature," but should "determine for itself the practical impact of the law." *Id.* at 336 (quoting *Lacoste v. Louisiana Department of Conservation,* 263 U.S. 545, 550 (1924)). *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 353 (1977). To survive this strict scrutiny, the state not only must articulate a legitimate purpose for enacting legislation but also must provide reasoned and significant support for the articulated purpose—in the nature of specific legislative or other studies or findings, or of evidence in the record. Such support was lacking in the present case, not because of the Georgia legislature's negligence or oversight but because no support exists. The legislature simply chose to "draft around" *Bacchus.*

Contrary to the unprecedented position adopted by the Georgia Supreme Court, *Bacchus* instructs that because the Georgia taxing scheme, on its face, constitutes economic

protectionism, it cannot be sustained under the Twenty-first Amendment:

> Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization.

468 U.S. at 276 (citing *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).

This Court recently reaffirmed this principle of *Bacchus* in striking, on Commerce Clause grounds, the protectionist legislation challenged in *Brown-Forman*. Even though the appellant in that case did not dispute the legitimacy of the state's asserted Twenty-first Amendment interest, 106 S. Ct. at 2085, this Court held New York's price affirmation statute unconstitutional on its face, stating:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute *without further inquiry*. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925); Edgar v. MITE Corp., 457 U.S. 624, 640-643 (1982) (plurality opinion).

106 S. Ct. at 2084 (emphasis added).

Aside from ignoring the import of *Bacchus* and *Brown-Forman*, the suggestion that Heublein did not challenge the purported purpose of defraying costs is clearly erroneous. Both in the superior court and on appeal, Heublein maintained that the purported purpose of the challenged taxes could not withstand scrutiny. Heublein maintained that the

asserted state purpose under the Twenty-first Amendment must be examined against the Commerce Clause interest, and that where economic protectionism is involved, a stated concern for the Twenty-first Amendment is insufficient to save the legislation. Transcript, September 20, 1985, at 6, 32. Heublein expressly stated that the "unsubstantiated statements" of the legislature concerning the purported purpose of rewriting the Georgia taxes were "form over substance" and legally insufficient as a basis to justify the legislation. *Id.* at 7.

Heublein expressly maintained before the Georgia Supreme Court that: (1) "the legislature did not make any specific findings of fact to support its conclusion that regulatory costs associated with imports are greater than those associated with domestic alcoholic beverages" [Brief of Appellant, at 13]; (2) "[u]nsupported recitals of reasons are not factfindings binding on the courts" [*id.*]; (3) "a 'finding' that finds a fact that does not exist simply is not binding on the judiciary" [*id.*]; (4) "the Bill did not actually increase any taxes to recover the allegedly greater costs" [*id.* at 15]; (5) "the claim that the costs of regulating alcoholic beverages are increased by the importation of out-of-state products is belied by the legislative history of the Georgia statute" [*id.*]; (6) "[t]he legislature's claim is further belied by the fact that the taxes paid pursuant to *O.C.G.A.* §§ 3-4-60 and 3-6-50 are paid not into a fund for regulation of alcoholic beverages, but into the general revenue fund of the State" [*id.* at 16]; (7) "the taxes do not directly affect either the State's control over whether alcoholic beverages are imported or the manner in which they are distributed within the State" [*id.* at 25]; and (8) "even if it could be said that Twenty-first Amendment concerns were *indirectly* implicated, it has been forcefully demonstrated that no credible claim can be made that the challenged legislation could rationally serve such concerns, for example, to defray increased administrative costs." *Id.* at 25-26.

The thrust of the State's argument is that the challenged statutes relate to the central concerns of the Twenty-first

Amendment. As a general principle, the purpose of a state excise tax is to raise revenue. Without question, this is the purpose of Official Code of Ga. Ann. §§ 3-4-60 and 3-6-50. On oral argument of Heublein's motion for preliminary injunction, Appellees represented to the superior court that the tax statutes were intended, at least in part, to be revenue raising. Transcript, May 7, 1985, at 18. By statute, the Georgia alcoholic beverage taxes are paid into the general revenue fund of the State. They are turned over to the Fiscal Division of the Department of Administrative Services to the credit of the general funds of the State. Official Code of Ga. Ann. § 3-2-10. Thus the taxes are not paid into a fund for the regulation of alcoholic beverages, whether imported or not, but are used for other purposes such as education and public welfare. *See id.* § 48-2-35(a) (refunds drawn from the general treasury of the State).

The State's authority to enact an excise tax does not come from the Twenty-first Amendment. The decisions of this Court hold that the core powers and central concerns of the Twenty-first Amendment relate to the regulation of the time, place, and manner under which alcoholic beverages may be imported and sold. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984). In *Capital Cities*, this Court defined the central power reserved to the states by the Twenty-first Amendment as "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 715 (quoting *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 110).

The taxes challenged in this case do not directly affect either the State's control over whether alcoholic beverages are imported or the structure of the distribution system within the State. The State has not even attempted to demonstrate how any such purpose of the Twenty-first Amendment is implicated by the Georgia taxes, whether directly or indirectly. Therefore the Georgia courts could not properly find that such a purpose is furthered by the taxes, and there was

absolutely no basis for the courts to hold that the taxes are constitutional under the Twenty-first Amendment.

III. A discriminatory state taxing scheme is not entitled to any special immunity merely because the taxes involve alcoholic beverages.

It is clear from the arguments presented in this case by the State, and from the decisions of the Georgia courts, that the State of Georgia wants a strict hands-off policy toward all legislation purported to have been enacted pursuant to the Twenty-first Amendment. In other words, the State takes the bizarre position that the Commerce Clause is "irrelevant" to the present case and seeks to establish a special immunity from established constitutional principles for discriminatory alcoholic beverage taxes. *See* Brief of Appellees, at 10.

There is absolutely no support for the position on the Twenty-first Amendment adopted by the Georgia courts. "Despite broad language in some of the opinions of this Court written shortly after ratification of the Amendment," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 274, this Court has *never* generalized that "the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 64 (1936). In its more recent opinions, relying upon "the obscurity of the legislative history of § 2" of the Twenty-first Amendment, this Court has emphasized to a greater degree than it had in earlier cases that substantial federal interests in liquor matters survived the ratification of the Twenty-first Amendment. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 274 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964)). *See 324 Liquor Corp. v. Duffy*, 107 S. Ct. at 727 & n.10; *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. at 2087-88.

In its decision in the present case, the Georgia Supreme Court discussed *Bacchus* and this Court's other Twenty-first Amendment decisions purely in an historical fashion. *Heublein, Inc. v. State*, 351 S.E.2d at 191-95. The court blatantly failed to consider the principles established in these decisions in light of the question and facts presented and, moreover, effectively repudiated these controlling decisions. The State of Georgia's attempt to create a rule of special immunity for legislation involving alcoholic beverages flies in the face of the clear teachings handed down by this Court time and time again and, therefore, the Georgia Supreme Court's decision must be reversed.

CONCLUSION

In summary, the mere articulation of a reason apparently unrelated to economic protectionism for enacting state legislation, which facially and effectively discriminates against interstate commerce and out-of-state businesses, is legally insufficient to immunize legislation from violation of the Commerce Clause or the principles of *Bacchus*. The mere recharacterization of a state taxing scheme cannot erase the fact that the taxes as originally enacted were protectionist, both in purpose and effect, any more than it can change the established rule that facially discriminatory taxes constitute simple economic protectionism. It is likewise insufficient to insulate discriminatory taxes from examination under the Equal Protection Clause or the rule of invalidity applied in *Metropolitan Life*.

Under either the Commerce Clause or Equal Protection Clause analysis, the taxes challenged in this case cannot withstand the required scrutiny. No purpose of the Twenty-first Amendment is implicated, either directly or indirectly, or could possibly be served by the Georgia taxes. The purported purpose was but a pretext for reenacting the protectionist legislation in effect in Georgia before this Court decided *Bacchus*.

Under *Bacchus*, as reaffirmed in the recent decisions of this Court to consider the Twenty-first Amendment, the Georgia taxes are unconstitutional and should have been declared invalid. If the conflicting decision of the Georgia Supreme Court is not reversed, it would establish a dangerous imprimatur, fatally destructive of established federal interests in preventing discrimination in respect to the regulation of alcoholic beverages. Such a decision would have the unprecedented effect of creating extraordinary authority for one state to discriminate against the others in the name of the United States Constitution and thereby deprive every other state from the protection of other long-standing principles under the same Constitution.

A substantial conflict exists between the decision of the Georgia Supreme Court and the teachings of this Court on the Commerce Clause, the Equal Protection Clause, and the Twenty-first Amendment. Heublein respectfully prays that this Court reaffirm these constitutional principles and reverse the decision of the Georgia Supreme Court.

Respectfully submitted,

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APPENDIX

IN THE
Supreme Court of Georgia

Decided: Jan. 7, 1987

43677. HEUBLEIN, INC. *v.* STATE OF GEORGIA *et al.*

MARSHALL, Chief Justice.

This is an action for declaratory judgment and injunctive relief by Heublein, Inc., an importer of alcoholic beverages into this state. The action is being prosecuted against Georgia's taxing authorities. Heublein seeks a declaration of unconstitutionality with respect to Georgia statutes providing for an import tax on all distilled spirits and table wines imported for use, consumption, or final delivery into this state. OCGA §§ 3-4-60 (2); 3-6-50 (b). Heublein argues that this import tax violates the Equal Protection and Commerce Clauses. The superior court upheld the constitutionality of the tax, and Heublein appeals.

OCGA §§ 3-4-60 and 3-6-50 were rewritten by Georgia Law 1985, p. 665 et seq. As rewritten, OCGA § 3-4-60 (1) imposes "upon the first sale, use, or final delivery within this state of all distilled spirits an excise tax in the amount of 50 cents per liter and, upon the first sale, use, or final delivery within this state of all alcohol, an excise tax in the amount of 70 cents per liter . . . " OCGA § 3-4-60 (2) imposes "upon the importation for use, consumption, or final delivery into this state of all distilled spirits an import tax in the amount of 50 cents per liter and, upon the importation for use, consumption, or final delivery into this state of all alcohol, an import tax in the amount of 70 cents per liter . . ."

OCGA § 3-6-50 (a) imposes "on the first sale, use, or final delivery within this state of all table wines an excise tax in the

amount of 11 cents per liter . . ." OCGA § 3-6-50 (b) imposes "upon the importation for use, consumption, or final delivery into this state of all table wines an import tax in the amount of 29 cents per liter . . ." OCGA § 3-6-50 (c) imposes "upon the first sale, use, or final delivery within this state of all dessert wines an excise tax in the amount of 27 cents per liter . . ." OCGA § 3-6-50(d) imposes "upon the importation for use, consumption, or final delivery into this state of all dessert wines an import tax in the amount of 40 cents per liter . . ."

In addition, all of these excise and import taxes impose "a proportionate tax at the same rate on all fractional parts of a liter."

1. The resolution of Heublein's constitutional claims is based on an analysis of a line of United States Supreme Court decisions commencing with *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (57 SC 77, 81 LE 38) (1936).

(a) In *Young's Market Co.*, supra, the plaintiffs were wholesale sellers within the State of California of beer imported from out of state. They were arguing that a California statute and implementing regulations imposing an importer's license fee for the privilege of importing beer into California violated the Commerce Clause by discriminating against the wholesale seller of imported beer in favor of the wholesale seller of beer locally brewed. They also argued that the importer's license fee was discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court held that the importer's license fee was valid under § 2 of the Twenty-first Amendment, which is the constitutional amendment that repealed Prohibition. Section 2 provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Court acknowledged that prior to adoption of the Twenty-first Amendment, imposition of the importer's license

fee "obviously" would have been unconstitutional as a "direct burden on interstate commerce." 299 U.S. at p. 62. However, the Court held that under the broad language of the Twenty-first Amendment, the right under the Commerce Clause to freely import from one state to another had been "abrogated . . . so far as concerns intoxicating liquors." Id. The Court further held that "[t]he claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." Id. at p. 64.

In addition, the Court held that "we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic." Id. at p. 63.

(b) Two years later in *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (58 SC 952, 82 LE 1424) (1938), the Court sustained the constitutionality of a Minnesota statute prohibiting the importation into the state of certain categories of intoxicating liquors. The Court held this statute to be constitutional, notwithstanding the discrimination arising in favor of liquor processed within the state. In so holding, the Court stated, "Since the adoption of the Twenty-first Amendment, the Equal Protection Clause is inapplicable to imported intoxicating liquor." 304 U.S. at p. 401 (1).

(c) However, in subsequent cases, the Court has not literally followed the broad holding that the right under the Commerce Clause to freely import from one state to another has been abrogated so far as concerns intoxicating liquors. These subsequent cases, which are discussed, infra, generally involve instances in which: (1) the challenged state liquor law did not, in fact, regulate the "transportation or importation" into the state of intoxicating liquors "for delivery or use therein," as specified in the Twenty-first Amendment; or (2) the challenged state liquor law trenched upon some

preeminent federal power. As to the Equal Protection Clause, at least in the area of individual rights, the Court has completely abandoned the view that state laws involving the regulation of intoxicating liquors within the state's borders are exempt from equal-protection challenges.

Thus, in *Collins v. Yosemite Park Co.*, 304 U.S. 518 (58 SC 1009, 82 LE 1502) (1938), it was held that the Twenty-first Amendment did not give California the power to prevent the shipment into and through her territory of liquor to be distributed and consumed in a national park. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (84 SC 1293, 12 LE2d 350) (1964), it was held that the Commerce Clause prohibited New York from interfering with the tax-free sales of liquor to departing international airline travelers at a New York airport for delivery at the traveler's foreign destination. In *Hostetter*, the Court stated:

"This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders . . .

"This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned. See *California v. Washington*, 358 U.S. 64 . . . *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 . . .

"To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurb[*sic*] oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect . . .

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U.S. 330-332.

(d) In *Craig v. Boren*, 429 U.S. 190, 209-210 (97 SC 451, 50 LE2d 397) (1976), the Court expressly held that "the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case."

At issue in *Craig* were Oklahoma statutory laws discriminating between males under the age of 21 and females under the age of 18 with respect to the sale of 3.2% beer. The Court held the question for decision to be "whether such a gender-based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment." 429 U.S. at p. 192. The Court held that this gender-based discrimination did violate equal protection, rejecting the argument that the fact that the challenged statutes concerned the sale and distribution of alcohol within the ambit of the Twenty-first Amendment insulated the statutes from the equal-protection challenge. As to this, the Court held that "the Twentyfirst[*sic*] Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." Id. at pp. 204-205.

However, it should be noted that the Court also distinguished *Mahoney* and *Young's Market Co.* as involving "purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment," Id. at p. 207, whereas *Craig* was viewed as involving "individual rights." Id. at p. 207.

In *Craig*, the Court went on to hold, "It is true that *California v. LaRue*, 409 U.S. 109, 115 (93 SC 390, 395, 34 LE2d 342) (1972), relied upon the Twenty-first Amendment

to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication,' id., at 118, 93 SC, at 397. Nevertheless, the Court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause. Rather, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-179 (92 SC 1965, 1974, 32 LE2d 627) (1972), establishes that state liquor regulatory schemes cannot work invidious discriminations that violate the Equal Protection Clause." 429 U.S. at pp. 207-208.

In *Moose Lodge*, supra, the Court, without any express consideration of the Twenty-first Amendment, held that where a state's liquor control board required compliance by private clubs with provisions of their constitutions and by-laws, which, in that case, contained racially discriminatory provisions, the Equal Protection Clause prohibiting discriminatory action by the state had been violated.

(e) In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (104 SC 2694, 81 LE2d 580) (1984), cable television system operators were seeking relief against enforcement of Oklahoma's prohibition against cable operators' carrying out-of-state alcoholic beverage commercials over their systems. The Supreme Court held that the state's ban conflicted with FCC regulations completely pre-empting[*sic*] regulation of "pay cable" programming and requiring that out-of-state television signals which are imported be retransmitted to subscribers without deletion or alteration. In *Capital Cities*, it was held that the Twenty-first Amendment did not save the ban from pre-emption[*sic*], since the state's power to regulate liquor importation and sale was not directly implicated. As to this, the Court stated:

"The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders. *Ziffrin, Inc. v. Reeves*,

[supra]. At the same time, our prior cases have made clear that the Amendment does not license the States to ignore their obligations under other provisions of the Constitution. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n 5, (74 LE2d 103, 297 SC 505) (1982); *California v. LaRue*, [supra]; *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (27 LE2d 91, 515 SC 507) (1971); *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-346 (12 LE2d 84, 362 SC 1247) (1964). Indeed, 'this Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.' *Craig v. Boren*, [supra]. Thus, as the Court explained in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, [supra], § 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause. Id., . . . ; *State Board of Equalization v. Young's Market Co.*, [supra]. We have cautioned, however, that 'to draw a conclusion . . . that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification.' *Hostetter*, supra, . . . Notwithstanding the Amendment's broad grant of powers to the States, therefore, the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor. Ibid. See also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, [445 U.S. 97, 109-110 (100 SC 937, 63 LE2d 233) (1980)]; *Nippert v. Richmond*, 327 U.S. 416, 425, n 15 (90 LE2d 66, 760 SC 586, 162 ALR 844) (1946); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (89 LE 65, 951 SC 661) (1945)." 467 U.S. at pp. 712-713.

(f) In 1984, the Supreme Court rendered its decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984), and this is the most relevant decision for the purposes of the present case.

At issue in *Bacchus* was an excise tax enacted by the State of Hawaii on sales of liquor at wholesale, and certain locally produced alcoholic beverages were exempted from the tax. The express purpose of the exemption was to encourage the development of the Hawaiian liquor industry. The Court noted that a finding that state legislation constitutes economic protection [*sic*] in violation of the Commerce Clause may be made on the basis of either discriminatory purpose or discriminatory effect. As authority, the Court cited *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333, 352-353 (97 SC 2434, 53 LE2d 383) (1977), and *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (98 SC 2351, 57 LE2d 475) (1978), which are traditional Commerce Clause cases. After so noting, the Court went on to hold that the express discriminatory purpose underlying the Hawaiian tax exemption was sufficient to invalidate it under the Commerce Clause.

In *Bacchus*, the state made a belated argument that even if the tax exemption violated ordinary Commerce Clause principles, it was saved by the Twenty-first Amendment. After reviewing the broad language of the earlier cases and the narrower holdings of the later cases, the Court rejected this argument, holding, "Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. [Cits.] State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry.' . . . Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the

Twenty-first Amendment, we reject the State's belated claim based on the Amendment." 82 LE2d at p. 212.

(e) In its most recent decision, the Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. (106 SC , 90 LE2d 552) (1986), struck down, as violating the Commerce Clause, a New York law which required distillers of liquor in New York to file monthly price schedules which prohibited them from selling their products to wholesalers within the state at prices any higher than the lowest prices that the distillers charged wholesalers anywhere else in the United States during the month in which the price schedule was filed.

Holding that the law violated the Commerce Clause, the Court categorized the law as an exercise in economic protectionism in which the State of New York was attempting to require producers or consumers in other states to surrender whatever competitive advantages they possessed to local producers or consumers. As to the argument that the Twenty-first Amendment saved the law from invalidation under the Commerce Clause, the Court held:

"New York has a valid constitutional interest in regulating sales of liquor within the territory of New York. Section 2 of the Twenty-first Amendment, however, speaks only to state regulation of the 'transportation or importation into any State . . . for the delivery or use therein' of alcoholic beverages. That Amendment, therefore, gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other states. The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country, *Idlewild Bon Voyage Liquor Corp.*, supra, or another State. Our conclusion that New York has attempted to regulate sales in other States of liquor that will be consumed in other States therefore disposes of the Twenty-first Amendment issue." Slip. Op. p. 11.

2. As previously stated, the statutory provisions which impose the import tax on distilled spirits, alcohol, and table wines were enacted in 1985. The preamble to the 1985 Act states, among its purposes, "to provide for the increased cost of administration and collection of revenues; to aid in the exercise of the police power; to promote temperance . . ." Ga. L. 1985, p. 665. Section 1 of the 1985 Act states, "The General Assembly finds and determines that the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines than it is for alcohol, distilled spirits, table wines, and dessert wines produced within this state and further finds and determines that it is in the best interest of the citizens of this state that the increased costs be provided for by taxation." Id.

In sustaining the constitutionality of the import tax under attack here, the trial court found that "it is axiomatic that the state may better police, regulate and control alcoholic beverages produced within its borders than that which is imported from other states, and that a cost differential exists with regard to the control and administration of the vast quantities of alcoholic beverages imported into this State." Heublein does not contest this finding, but rather expressly stated before the trial court that "we are not sitting here and challenging what the state says their purpose was in adopting this legislation. This is not a factual case. What we are saying is whatever you feel your reason was, it doesn't fly in light of the Commerce Clause." Heublein maintains this argument before this court as well.

We must disagree with Heublein's argument that, regardless of the purpose underlying this import tax, "it doesn't fly in light of the Commerce Clause." The court in *Bacchus* clearly acknowledged that, although the tax there did violate the Commerce Clause because its undisputed purpose was to promote local industry, the question for decision in a case in which a liquor law within the ambit of the Twenty-first

Amendment is challenged as violating the Commerce Clause is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." 82 LE2d at p. 212. Here, the unchallenged purpose of the import tax implicates central concerns of the Twenty-first Amendment, i.e., defraying the increased costs of regulating the importation into this state of intoxicating liquors. For this reason, we cannot say that the trial court erred in sustaining the constitutional validity of the tax under the Twenty-first Amendment rather than striking it down under the Commerce Clause.

3. Heublein also argues that the import tax violates the Equal Protection Clause. However, what this case involves are "purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment." *Craig v. Barnes* [*sic*], supra, 429 U.S. at p. 207. Here, the import tax is rationally related to the accomplishment of the legitimate state objective of regulating the importation into the state of intoxicating liquor. For this reason, we find no equal-protection violation.

Judgment affirmed. All the Justices concur.

IN THE

Superior Court of Fulton County

STATE OF GEORGIA

HEUBLEIN, INC.,
a Connecticut Corporation,

Plaintiff,

vs.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Defendants.

CIVIL ACTION

File No. D-20634

ORDER

On April 1, 1985, O.C.G.A. §§ 3-4-60 and 3-6-50 were amended so as to change the taxation of alcoholic beverages sold within this State. Under the new law, all distilled spirits and wines are subject to an alcohol excise tax, and all imported distilled spirits and wines are subject to an additional import tax. Plaintiff challenges the authority of the State of Georgia to impose the import tax under any circumstances, and seeks, among other things, a judicial declaration that the Georgia import tax on alcoholic beverages is unconstitutional. In addition, Plaintiff seeks a preliminary injunction enjoining the assessment and collection of said taxes during the pendency of this litigation.

The Complaint focuses upon legislation which was approved by the Georgia Legislature, and signed by the Governor on April 1, 1985. The Act by the Legislature amended Title 3 of The Official Code of Georgia, said title relating to the establishment of excise taxes of alcohol, distilled spirits, table wines and dessert wines. The Amendment struck in its entirety Code § 3-4-60 relating to the levy and amount of State excise taxes imposed on alcohol and distilled spirits, and inserting [*sic*] in its place § 3-4-60.

The Plaintiff, Heublein, Inc., a Connecticut Corporation, and a producer and importer of distilled spirits and wine, contend [*sic*] that the amended Act is in violation of the Interstate Commerce Clause and the Equal Protection Clause. The Plaintiff contends that non-resident producers pay tax which is 50% higher than in-state producers of spirits.

There are four prerequisites for the issuance of a preliminary injunction: (1) a substantial likelihood that the movant will prevail on ther[*sic*] merits; (2) a substantial threat that the movant will suffer irreparable harm if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the opponent; and (4) that the granting of the preliminary injunction will not disserve the public interest. *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185 (5th Cir. 1982); *Compact Van Equipment Co. v. Leggett & Platt, Inc.*, 566 F.2d 952 (5th Cir. 1978).

It is well established that if Plaintiff prevails on final judgment, it will be entitled to procedures set up in the Revenue Code whereby it may seek a refund of the taxes paid under the challenged statute. Case law makes it clear that mere threatened monetary injury, which can be redressed in damages, is insufficient to establish the irreparable injury essential to the issuance of a preliminary injunction. See *Corbin v. Corbin*, 429 F. Supp. 276, 282 (M.D. Ga. 1977), *citing Sampson v. Murray*, 416 U.S. 61 (1974); *see also Georgia Gazette Pub. Co. v. U.S. Dept. of Defense*, 562 F.

Supp. 1004, 1010 (S.D. Ga. 1983) ("It is well-settled that the temporary loss of money is not an irreparable injury.")

The Court finds the Plaintiff has failed to carry its burden of proof with regard to the prerequisites to preliminary injunctive relief. A preliminary injunction will not issue unless the Movant carries the burden as to prerequisites. Having found the Plaintiff will not suffer irreparable harm if the preliminary injunction is not granted,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer for preliminary injunction be and the same is hereby DENIED. *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 186 (5th Cir. 1982), *citing Vision Center v. Opticks, Inc.*, 596 F. 2d 111, 114 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

IT IS FURTHER ORDERED the Motion for Declaratory Judgment be placed upon the calendar for further hearing so that the Court may enter final judgment in said matter.

SO ORDERED, this 12th day of May, 1985.

/s/ OSGOOD O. WILLIAMS

Osgood O. Williams
Judge, Fulton Superior Court
ATLANTA JUDICIAL CIRCUIT

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IN THE

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a Connecticut Corporation,

Plaintiff,

vs.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

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CIVIL ACTION

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ORDER

On April 1, 1985, O.C.G.A. §§ 3-4-60 and 3-6-50 were amended so as to change the taxation of alcoholic beverages sold within this State. Under the new law, all distilled spirits and wines are subject to an alcohol excise tax, and all imported distilled spirits and wines are subject to an additional import tax. Plaintiff, Heublein, Inc., challenges the authority of the State of Georgia to impose the import tax under any circumstances, and seeks, among other things, a judicial declaration that the Georgia import tax on alcoholic beverages is unconstitutional. Plaintiff also sought temporary and preliminary injunctions enjoining the assessment and collection of said taxes during the pendency of this litigation.

An order denying said injunctive relief was entered by this Court on May 12, 1985.

The primary issue for this Court to decide is whether a state, in accordance with the Twenty-first Amendment,[1] may impose an import tax on alcoholic beverages if such tax is designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment. The most recent United States Supreme Court decision dealing with the question of taxation and the Twenty-first Amendment, *Bacchus Imports, Ltd. v. Dias*, 52 U.S.L.W. 4979 (June 26, 1984), struck down a Hawaiian statute that exempted alcoholic beverages produced from two specific locally grown products from the excise tax imposed on all other alcoholic beverages, whether imported or not. 52 U.S.L.W. at 4980.

Under the facts in *Bacchus*, no tax was imposed on the importing of alcoholic beverages and thus the Supreme Court did not extend its decision thereto. Instead the Court struck down the Hawaiian statute primarily on Commerce Clause grounds. "Because the tax violates a central tenet of the Commerce Clause but is not supported by *any* clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment." 52 U.S.L.W. at 4983 (emphasis added). In so doing, the Court emphasized that the Hawaiian legislation had as its express purpose the promotion of local industry. "We need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry." 52 U.S.L.W. at 4981. With this in mind, the Supreme Court held that "State laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, *the State does not seek to justify its tax on the ground that it was designed to promote temperance or to*

[1] The Twenty-first Amendment, § 2, provides: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry'." 52 U.S.L.W. at 4983 (emphasis added).

The Georgia legislation presently under attack, unlike the legislation struck down in *Bacchus*, specifically addresses several concerns central to the purpose of the Twenty-first Amendment. The caption of House Bill 564 states, among other things, that the bill is to "Provide for the increased cost of administration and collection of revenues, to aid in the exercise of the police power [and] to promote temperance." Under Georgia law, "Nothing is better settled than that the intention of the General Assembly in the passage of a law is derivable as well from the caption of the act as from the body of the act itself." *Sovereign Camp Woodmen of the World v. Beard*, 26 Ga. App. 130, 131-32, 105 S.E. 629, 631 (1920).

Furthermore, Section 1 of the Act contains an express legislative finding that the legislation was designed to carry out a central purpose of the Twenty-first Amendment: "The General Assembly finds and determines that the cost of regulating and administering the manufacture, distribution and sale of alcohol, distilled spirits, table wines and dessert wines consumed in this State is greater for imported alcohol, distilled spirits, table wines and dessert wines than it is for alcohol, distilled spirits, table wines and dessert wines produced within this State, and further finds and determines that it is in the best interest of the citizens of this State that the increased cost be provided for by taxation." These findings must be accorded great deference.

The law in Georgia is quite clear with regard to legislative findings of fact: "If under any possible state of facts an act would be constitutional, the Courts are bound to presume that such facts exist; and therefore the Court will not make a separate investigation of the facts, or attempt to decide whether the legislature has reached a correct conclusion with respect to them." *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 371, 3 S.E.2d 705, 716 (1939). *See*

also Pearl Optical of Monroeville, Inc. v. State Board of Examiners of Optometry, 219 Ga. 364, 371, 138 S.E.2d 374, 379 (1963) ("We reject the contention . . . that the declaration is a mere effort on the part of the General Assembly to establish a fact by legislative fiat. It is the province of a lawmaking body to adjudge the sufficiency of the factual foundation necessary to support the statute it enacted into law."); *Bohannon v. Duncan*, 185 Ga. 840, 196 S.E.2d, 897, 898 (1938) ("Since all reasonable presumptions favor the constitutionality of a legislative act, and the burden of showing to the contrary is on the attacking party, 'legislative ascertainments and determinations of fact, unless plainly contrary to those matters of common knowledge of which the Courts may take judicial notice, are entitled to such weight as to require clear allegation and proof showing to the contrary before the Courts would be justified' in so holding."). The District Court for the Northern District of Georgia reiterated this proposition when it held that "Only a 'clear showing' of arbitrariness would allow a Court to substitute its judgment for that of the State Legislature in the area of regulation of the alcoholic beverages industry. If the State's law is 'arguably reasonable,' it should be sustained." *Allstate Beer, Inc. v. Julius Wild* [*sic*] *Sons & Company*, 479 F. Supp. 605, 610 (N.D. Ga. 1979), *quoting Parks v. Allen*, 426 F.2d 610, 613-14 (5th Cir. 1970).

In light of the foregoing, this Court finds that the State of Georgia does "seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment," 52 U.S.L.W. at 4983, and that the legislative findings contained in the Act evince a "clear concern of the Twenty-first Amendment." *Id.* Furthermore, it is axiomatic that a state may better police, regulate and control alcoholic beverages produced within its borders than that which is imported from other states, and that a cost differential exists with regard to the control and administration of the vast quantities of alcoholic beverages imported into this State. The Twenty-first Amendment, as

well as Justice Brandeis' opinion for a unanimous Supreme Court in the seminal case of *State Board of Equalization v. Young's Market Company*, 299 U.S. 59 (1936), recognized this fact implicitly. As the unanimous Court in *Young's Market* held: "[I]n the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic." 299 U.S. at 663.

The Court thus finds that Plaintiff's Commerce Clause challenge to the Georgia import tax on alcoholic beverages must fail in light of the Twenty-first Amendment and the Supreme Court's recent decision in *Bacchus*. For more than half a century, the Supreme court [*sic*] has consistently held that the states must be accorded wide latitude in their choice of means to accomplish permissible ends under the Twenty-First [*sic*] Amendment. *See California v. LaRue*, 409 U.S. 109, 116 (1972), *citing Seagram & Sons v. Hostetter*, 384 U.S. 35, 48 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, 377 U.S. 324, 330 (1964); *State Board of Equalization v. Young's Market Company*, 299 U.S. 59 (1936).

Plaintiff also asserts an equal protection challenge to Georgia's import tax on alcoholic beverages. This challenge must also fail because the Supreme Court has expressly indicated, even prior to *Bacchus*, that state regulation of alcoholic beverages that touches upon purely economic matters merits only the "mildest review" under the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 207 (1976). *See also Lanierland Distributors, Inc. v. Strickland*, 544 F. Supp. 744, 751-52 (N.D. Ga. 1982); *Parks v. Allen*, 426 F.2d 610, 613 (5th Cir. 1970). The legislative purpose in passing the Act in question, as well as, the legislative findings contained therein, clearly establish a rational basis for the legislation. In addition, it should be noted that the import tax is imposed on alcoholic beverages imported into the State of Georgia by *any*

manufacturer. There is no disparate treatment or discrimination with regard to anyone who imports alcoholic beverages into the State of Georgia. All importers are treated similarly.

Plaintiff's other claims are totally without merit.

This Court thus finds that the Georgia import tax imposed pursuant to O.C.G.A. §§ 3-4-60 and 3-6-50 is constitutional under the Twenty-first Amendment of the United States Constitution, and that Plaintiff's challenges based on the Commerce Clause, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Privileges and Immunities Clause are without merit.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants on all counts.

SO ORDERED, this 23rd day of September, 1985.

/s/ OSGOOD O. WILLIAMS

Osgood O. Williams
Judge, Fulton Superior Court
ATLANTA JUDICIAL CIRCUIT

Civil Action File No. D-20634

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Defendants.

CIVIL ACTION

File No. D-20634

ORDER

Plaintiff Heublein, Inc.'s Motion for Reconsideration filed in this Court on October 8, 1985, in the above-styled case, is hereby DENIED.

SO ORDERED, this 20th day of November, 1985.

/s/ OSGOOD O. WILLIAMS

Osgood O. Williams
Judge, Fulton Superior Court
ATLANTA JUDICIAL CIRCUIT

Civil Action File No. D-20634

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Supreme Court of Georgia

ATLANTA

January 7, 1987

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

HEUBLEIN, INC. *v.* STATE OF GEORGIA *et al.*

This case came before this court upon an appeal from the Superior Court of Fulton County and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

IT IS ORDERED THAT THE JUDGMENT OF THE SUPREME COURT OF GEORGIA IN THE WITHIN STATED CASE, BE AND THE SAME IS HEREBY MADE THE JUDGMENT OF THIS COURT. THIS THE 9TH DAY OF FEBRUARY 1987.

/s/ OSGOOD O. WILLIAMS
Judge Fulton Superior Court, A.J.C.

Bill of Costs, $30.00

Supreme Court of the State of Georgia

CLERK'S OFFICE, ATLANTA

1/23/87

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Ron Emmons paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ JOLINE B. WILLIAMS
Clerk

IN THE

Supreme Court

STATE OF GEORGIA

HEUBLEIN, INC., a Connecticut corporation, *Appellant,* v. STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, *Appellees.*	CASE NO. 43677

NOTICE OF APPEAL

Notice is hereby given that Heublein, Inc., Appellant above-named, hereby appeals to the Supreme Court of the United States from the decision and judgment entered herein on January 7, 1987. Appeal to the Supreme Court of the United States is taken pursuant to 28 U.S.C. §§ 1257(2) and 2101(c).

Dated: April 6, 1987.

/s/ JOHN L. SCHAUB

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Attorneys for Appellant
HEUBLEIN, INC.

AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON } ss.:

Personally appeared before the undersigned officer duly authorized to administer oaths in the state and county aforesaid, JOHN L. SCHAUB, who first being duly sworn, deposes and says as follows:

I am one of the attorneys for Appellant Heublein, Inc. in this matter. I hereby certify that I have this day served the foregoing Notice of Appeal upon each party to this proceeding in the manner prescribed by U.S. Sup. Ct. R. 28.3 at or before the time of filing thereof by depositing a copy thereof in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record for Appellees at his post office address as follows:

State of Georgia,
Governor Joe Frank Harris,
Marcus E. Collins, Georgia State Revenue Commissioner, and
Claude L. Vickers, Director of the Fiscal Division of the Department of Administrative Services,

through their counsel of record,
Jeff L. Milsteen, Esq.
The Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

I hereby further certify pursuant to U.S. Sup. Ct. R. 28.5 that all parties required to be served with the foregoing Notice of Appeal, whose names and addresses are set forth above, have been served as set forth herein.

Dated: April 6, 1987.

/s/ JOHN L. SCHAUB
John L. Schaub

Sworn to and subscribed
before me this 6th day
of April, 1987.

/s/ YVONNE M. SCHUECKING
Notary Public

[SEAL]

OFFICIAL CODE OF GA. ANN. §§ 3-4-60 AND 3-6-50

3-4-60. Levy and amount of tax.

The following state taxes are levied and imposed:

(1) There shall be imposed upon the first sale, use, or final delivery within this state of all distilled spirits an excise tax in the amount of 50¢ per liter and, upon the first sale, use, or final delivery within this state of all alcohol, an excise tax in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all distilled spirits an import tax in the amount of 50¢ per liter and, upon the importation for use, consumption, or final delivery into this state of all alcohol, an import tax in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter; and

(3) All alcohol spirits manufactured within this state for sale within this state shall be made from Georgia grown products.

3-6-50. Levy and amount of tax.

(a) There shall be levied and imposed on the first sale, use, or final delivery within this state of all table wines an excise tax in the amount of 11¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(b) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all table wines an import tax in the amount of 29¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(c) There shall be levied and imposed upon the first sale, use, or final delivery within this state of all dessert wines an excise tax in the amount of 27¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(d) There shall be levied and imposed upon the importation for use, consumption, or final delivery into this state of all

dessert wines an import tax in the amount of 40¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

OFFICIAL CODE OF GA. ANN. §§ 3-4-60 AND 3-6-50 (1982)

3-4-60. Levy and amount of tax.

The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50¢ per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter.

3-6-50. Levy and amount of tax.

There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine produced within the state from at least 40 percent of fruits and berries grown within the state:

(A) Eleven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Forty cents per liter and a proportionate tax on [*sic*] like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(2) On table wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 40¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(3) On dessert wines produced within the state, from at least 40 percent of fruits and berries grown within the state:

(A) Twenty-seven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Sixty-seven cents per liter and a proportionate tax on [*sic*] like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(4) On dessert wines produced within the state wholly from fruits and berries grown within the state to which wine spirits produced outside the state have been added, 67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter; and

(5) On dessert wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

HOUSE BILL NO. 463

A BILL TO BE ENTITLED
AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to change certain excise taxes on distilled spirits, alcohol, table wines, and dessert wines; to provide that such taxes shall be levied on the first sale, use, possession, or final delivery; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking in its entirety Code Section 3-4-60, relating to the levy and amount of excise taxes on distilled spirits and alcohol, which reads as follows:

"3-4-60. The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50¢ per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter.",

and inserting in lieu thereof a new Code Section 3-4-60 to read as follows:

"3-4-60. There is levied and imposed on the first sale, use, possession, or final delivery the following state excise taxes:

(1) On all distilled spirits, whether imported into this state or manufactured in this state, a tax of $1.00 per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On all alcohol, whether imported into this state or manufactured in this state, a tax of $1.40 per liter and a proportionate tax at the same rate on all fractional parts of a liter."

SECTION 2. Said title is further amended by striking in its entirety Code Section 3-6-50, relating to the levy and amount of excise taxes on wines, which reads as follows:

"3-6-50. There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine produced within the state from at least 40 percent of fruits and berries grown within the state:

(A) Eleven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Forty cents per liter and a proportionate tax on [*sic*] like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(2) On table wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 40¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(3) On dessert wines produced within the state, from at least 40 percent of fruits and berries grown within the state:

(A) Twenty-seven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Sixty-seven cents per liter and a proportionate tax on [*sic*] like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(4) On dessert wines produced within the state wholly from fruits and berries grown within the state to which wine spirits produced outside the state have been added,

67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter; and

(5) On dessert wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.",

and inserting in lieu thereof a new Code Section 3-6-50 to read as follows:

"3-6-50. There is levied and imposed on the first sale, use, possession, or final delivery of wines within this state the following taxes:

(1) On table wine, a tax of 40¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On dessert wines, a tax of 67¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter."

SECTION 3. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

SECTION 4. All laws and parts of laws in conflict with this Act are repealed.

HOUSE BILL NO. 564

A BILL TO BE ENTITLED AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to provide for legislative intent; to establish excise taxes upon the first sale, use, or final delivery within this state of alcohol, distilled spirits, table wines, and dessert wines; to establish a tax upon the importation for use, consumption, or final delivery into this state of alcohol, distilled spirits, table wines, and dessert wines; to provide for the increased cost of administration and

collection of revenues; to aid in the exercise of the police power; to promote temperance; to provide an effective date; to provide that this Act shall not be severable; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1. The General Assembly finds and determines that the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines than it is for alcohol, distilled spirits, table wines, and dessert wines produced within this state and further finds and determines that it is in the best interest of the citizens of this state that the increased costs be provided for by taxation.

SECTION 2. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking in its entirety Code Section 3-4-60, relating to the levy and amount of state excise taxes imposed on alcohol and distilled spirits, and inserting in its place a new Code Section 3-4-60 to read as follows:

"3-4-60. The following state taxes are levied and imposed:

(1) There shall be imposed upon the first sale, use, or final delivery within this state of all distilled spirits an excise tax in the amount of 50¢ per liter and, upon the first sale, use, or final delivery within this state of all alcohol, an excise tax in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all distilled spirits an import tax in the amount of 50¢ per liter and, upon the importation for use, consumption, or final delivery into this state of all alcohol, an import tax

in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter; and

(3) All alcohol spirits manufactured within this state for sale within this state shall be made from Georgia grown products."

SECTION 3. Said title is further amended by striking in its entirety Code Section 3-6-50, relating to the levy and amount of state excise taxes on wine, and inserting in its place a new Code Section 3-6-50 to read as follows:

"3-6-50. (a) There shall be levied and imposed on the first sale, use, or final delivery within this state of all table wines an excise tax in the amount of 11¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(b) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all table wines an import tax in the amount of 29¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(c) There shall be levied and imposed upon the first sale, use, or final delivery within this state of all dessert wines an excise tax in the amount of 27¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(d) There shall be levied and imposed upon the importation for use, consumption, or final delivery into this state of all dessert wines an import tax in the amount of 40¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter."

SECTION 4. It is the express intention of the General Assembly that the provisions of this Act shall not be severable. In the event that any section or portion of any section of this Act is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall render the entire Act invalid, void, and of no effect and shall specifically revive the provisions affected by this Act as such provisions stood

before the enactment of this Act, as amended by laws other than this Act.

SECTION 5. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

SECTION 6. All laws and parts of laws in conflict with this Act are repealed.

AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON } ss.:

Personally appeared before the undersigned officer duly authorized to administer oaths in the state and county aforesaid, JOHN L. SCHAUB, who first being duly sworn, deposes and says as follows:

I am one of the attorneys for Appellant Heublein, Inc. in this matter. I hereby certify that on April 7, 1987, I served the Jurisdictional Statement, and that on April 23, 1987, I have served the accompanying substitute Jurisdictional Statement upon each party to this proceeding in the manner prescribed by U.S. Sup. Ct. R. 28.3 at or before the time of filing thereof by depositing three copies thereof in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record for Appellees at his post office address as follows:

State of Georgia,
Governor Joe Frank Harris,
Marcus E. Collins, Georgia State Revenue Commissioner, and
Claude L. Vickers, Director of the Fiscal Division of the Department of Administrative Services,

through their counsel of record,
Jeff L. Milsteen, Esq.
The Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

I hereby further certify pursuant to U.S. Sup. Ct. R. 28.5 that all parties required to be served with the accompanying Jurisdictional Statement, whose names and addresses are set forth above, have been served as set forth herein.

Dated: April 23, 1987.

/s/_____

John L. Schaub

Sworn to and subscribed
before me this 23rd day
of April, 1987.

/s/_____

Notary Public

Supreme Court, U.S.
FILED
MAY 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1722

In The

Supreme Court of the United States

October Term, 1986

HEUBLEIN, INC., a Connecticut corporation,

Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

On Appeal from the Supreme Court of Georgia

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the questions presented by the Appellant are in fact substantial where Appellant developed no factual record upon which to base its attack on the General Assembly's stated purpose in enacting Georgia's import tax on alcoholic beverages, and where Appellant expressly waived any challenge to such stated purpose in the courts below?
2. Whether the State of Georgia may constitutionally impose a tax on the importation of alcoholic beverages where the unchallenged purpose of the tax implicates central concerns of the Twenty-first Amendment?

PARTIES

Appellees concur in the list of parties presented by Appellant.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Table of Contents	ii
Table of Authorities	iv
Motion to Dismiss or Affirm	1
Citations to Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
The Questions Presented Are Not Substantial	7
I. The questions presented by the Appellant are not substantial where Appellant developed no factual record upon which to base its attack on the General Assembly's stated purpose in enacting Georgia's import tax on alcoholic beverages, and where Appellant expressly waived any challenge to such stated purpose in the courts below	7
II. The State of Georgia may constitutionally impose a tax on the importation of alcoholic beverages where the unchallenged purpose of the tax implicates central concerns of the Twenty-first Amendment	10
A. The states' power to regulate the importation of alcoholic beverages has been specifically reserved to the states by the Twenty-first Amendment and outweighs the general Commerce Clause principles relied upon by the Appellant in this case	10
B. Since state regulation of alcoholic beverages that incidentally infringes upon purely economic interests merits only the "mildest re-	

TABLE OF CONTENTS—Continued

Page

view'' under the Fourteenth Amendment, the Twenty-first Amendment concerns implicated by the challenged legislation provide a sufficient rational basis for sustaining Georgia's import tax against the Appellant's equal protection attack 16

Conclusion 18

TABLE OF AUTHORITIES

Page

CASES

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 4, 5, 6, 12, 13, 14, 15

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080 (1986) 18

California v. LaRue, 409 U.S. 109 (1972) 11

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980) 7, 9, 11, 18

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 14, 18

Craig v. Boren, 429 U.S. 190 (1976) 14, 16

Department of Revenue v. James Beam Co., 377 U.S. 341 (1964) 14

Heublein, Inc. v. Georgia, 256 Ga. 578, 351 S.E.2d 190 (1987) 6, 10, 15

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 11, 12, 14, 15

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 16

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 8

Seagrams & Sons v. Hostetter, 384 U.S. 35 (1966) 10, 11

State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936) 11, 12

Steagald v. United States, 451 U.S. 204 (1981) 8

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 9

Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) 11

324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987) 9, 18

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 ..... *passim*
U.S. Const. amend. XIV, § 1 16
U.S. Const. amend. XXI, § 2 ..... *passim*

STATUTES

U.S. Sup. Ct. R. 16.1(b) 1
Official Code of Ga. Ann. § 3-4-60 ..... 2, 16
Official Code of Ga. Ann. § 3-6-50 ..... 2, 16

OTHER AUTHORITIES

Ga. H.B. No. 564, 1985 Ga. Laws 665 3

No. 86-1722

In The

Supreme Court of the United States

October Term, 1986

HEUBLEIN, INC., a Connecticut corporation,

Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

On Appeal from the Supreme Court of Georgia

MOTION TO DISMISS OR AFFIRM

Appellees in the above-styled case respectfully move, pursuant to Rule 16.1(b) of the United States Supreme Court, that this Court dismiss this appeal for want of a substantial question, or that it affirm the Georgia Supreme Court without further argument.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is officially reported at 256 Ga. 578 (1987), and is unofficially

reported at 351 S.E.2d 190 (1987). The text of the opinion is contained in the Appendix to Appellant's Jurisdictional Statement at page A-1.

The decisions and orders of the Superior Court of Fulton County, Georgia are not reported. The texts of these decisions and orders are contained in the Appendix to Appellant's Jurisdictional Statement at pages A-12, A-16, and A-23.

———o———

STATEMENT OF JURISDICTION

Appellees concur in the Statement of Jurisdiction presented by Appellant.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellees concur in Appellant's enumeration of the Constitutional Provisions and Statutes Involved.

———o———

STATEMENT OF THE CASE

On April 1, 1985, the General Assembly of Georgia amended Official Code of Georgia Annotated §§ 3-4-60 and 3-6-50 so as to change the taxation of alcoholic beverages sold within the State of Georgia. Under the new system, all distilled spirits and wines are subject to an alcohol excise tax. All imported distilled spirits and wines,

whether imported by in-state or out-of-state producers or manufacturers, are subject to an additional import tax. The caption of House Bill 564, which enacted the new system, stated that the legislature's purpose was to "provide for the increased cost of administration and collection of revenues; to aid in the exercise of the police power; [and] to promote temperance." Appellant's Jurisdictional Statement, p. A-35, -36. In addition to this general statement of purpose, Section 1 of the bill contained express legislative findings specifically addressed to central concerns of the Twenty-first Amendment:

> The General Assembly finds and determines that the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines than it is for alcohol, distilled spirits, table wines, and dessert wines produced within this state and further finds and determines that it is in the best interest of the citizens of this state that the increased costs be provided for by taxation.

Appellant's Jurisdictional Statement, p. A-36.

On April 29, 1985, Heublein, Inc., a Connecticut corporation and a producer and importer of alcoholic beverages, brought an action for declaratory and injunctive relief in the Superior Court of Fulton County, Georgia. In its complaint, Heublein challenged the State of Georgia's authority to impose an import tax on alcoholic beverages under any circumstances and sought a judicial declaration that the import taxes in question violated the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause of the United States Constitution.

In addition, Heublein requested a preliminary injunction against the assessment and collection of the import taxes during the pendency of the litigation. On May 12, 1985, the superior court denied Heublein's motion for a preliminary injunction because Heublein failed to establish that it would suffer irreparable harm if the assessment and collection of the taxes were not enjoined.

On September 20, 1985, the superior court heard Heublein's Motion for Declaratory Judgment. At that time, Heublein argued the grounds upon which it claimed that the Georgia statutes were unconstitutional. Throughout oral argument, Heublein made clear its position that a state could *under no circumstances* enact a tax on alcoholic beverages which had the effect of discriminating against out-of-state manufacturers. When asked by the trial judge about the Georgia General Assembly's stated purpose in enacting the legislation, Heublein stated that:

> [t]hose unsubstantiated statements have absolutely no merit to them anymore, ever since *Bacchus* came down and set the ground work. *Bacchus* said as a matter of law you don't have to go any further. This is a *per se* illegal enactment. You cannot justify it under any circumstances, that is what [the *Bacchus* Court] said, when you are looking at something that discriminates.

Transcript, September 20, 1985, p. 7. Heublein later reiterated:

> Your Honor, let me make our position perfectly clear. We are not questioning the State's purpose here . . . we are not sitting here and challenging what the State says their purpose was in adopting this legislation. This is not a factual case. What we are saying is

> whatever you feel your reason was, it doesn't fly in light of the Commerce Clause.

Id. at 31-32. Finally, in an attempt to explain its failure to produce any facts or evidence contrary to the General Assembly's stated purpose in enacting the statutes, Heublein concluded by stating:

> Your Honor, everything you need in this case is before you. We are dealing with a facial challenge to a statute, which we contend is *per se* illegal. There are no facts to be determined. Everything you need is in front of you, Your Honor, to rule on our motion for declaratory judgment. We are not taking issue with the purpose that is being advanced by the State. We are just simply stating consistent with all of the known law that it just falls when you consider the competing Federal interest here, which says we will not tolerate this type of economic protectionism.

Id. at 34 (emphasis added).

On September 23, 1985, the superior court rendered its judgment on the constitutional issues as framed by Heublein. At the outset of its opinion, the court pointed out that "[p]laintiff, Heublein, Inc., challenges the authority of the State of Georgia to impose the import tax *under any circumstances* . . . ." Appellant's Jurisdictional Statement at A-16 (emphasis added). The court then examined this Court's interpretation of the Twenty-first Amendment as it relates to a state's power to regulate the importation of alcoholic beverages. Relying primarily upon *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the superior court held that the purpose set out by the General Assembly in enacting Georgia's statutes, i.e., taxing imported alcoholic beverages so as to defray the increased

costs of regulating such beverages, sufficiently implicated principles underlying the Twenty-first Amendment so as to outweigh Commerce Clause considerations and withstand Heublein's equal protection attack. Appellant's Jurisdictional Statement at A-20, -21.

After noting that Heublein, at the superior court level, had expressly renounced any challenge to the General Assembly's purpose in enacting the import tax, and after observing that Heublein, at the appellate court level, continued to assert that the legislature's purpose was irrelevant to Heublein's constitutional arguments, the Georgia Supreme Court disagreed with Heublein's contention that Georgia's import tax "doesn't fly in light of the Commerce Clause" notwithstanding the clear Twenty-first Amendment purposes underlying the legislation. *Heublein, Inc. v. State of Georgia,* 256 Ga. 578, 584, 351 S.E.2d 190, 196 (1987). Instead, the Court determined that a balancing between federal and state interests must be undertaken, and that the only relevant inquiry properly before it was "whether the principles underlying the Twenty-first Amendment [were] sufficiently implicated ... to outweigh the Commerce Clause principles that would otherwise be offended." *Id., quoting Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 275 (1984). Holding that "the unchallenged purpose of the import tax implicates central concerns of the Twenty-first Amendment, i.e., defraying the increased costs of regulating the importation into this State of intoxicating liquors," 256 Ga. at 584-85, 351 S.E.2d at 196, the Georgia Supreme Court upheld the statutes as against Heublein's Commerce Clause challenge. *Id.* The Georgia Supreme Court then noted that state regulation of alcoholic beverages that incidentally infringes upon purely economic interests traditionally merits only the mildest review under the Fourteenth Amendment, that

Georgia's import tax was rationally related to the accomplishment of the legitimate state objective of regulating the importation of intoxicating liquor into the state, and that Heublein's equal protection claim was therefore without merit. *Id.*

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THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. The questions presented by the Appellant are not substantial where Appellant developed no factual record upon which to base its attack on the General Assembly's stated purpose in enacting Georgia's import tax on alcoholic beverages, and where Appellant expressly waived any challenge to such stated purpose in the courts below.

Questions involving the limits of the states' authority under the Twenty-first Amendment to regulate alcoholic beverages are generally important ones. Because such questions are usually important, however, and because there is no "bright line between federal and state powers over liquor," *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980), this Court should regard as substantial only those questions which have been adequately, clearly, and properly raised below.

It is clear from the Appellant's statement of the "Questions Presented" that the Appellant's arguments are now principally directed toward the legislative purpose asserted by the Georgia General Assembly in support of the challenged statutes, and that the Appellant's contention of unconstitutionality rests primarily upon its assertion now that it "presented convincing evidence that

[the General Assembly's stated purposes] were pretextual and could not possibly be served by the legislation . . . ." Appellant's Jurisdictional Statement, p. 11. The record quite clearly reflects, however, that Heublein presented no factual evidence whatsoever concerning the General Assembly's stated purposes. Heublein, in fact, expressly waived any challenge to the legislative purpose in the lower courts. A party may lose its right to raise factual issues before this Court when it has made contrary assertions in the courts below. *Steagald v. United States,* 451 U.S. 204, 209 (1981). Heublein repeatedly asserted at oral argument before the superior court that "[w]e are not questioning the State's purpose here," "we are not sitting here and challenging what the State says their purpose was in adopting this legislation," and "[w]e are not taking issue with the purpose that is being advanced by the State." Transcript, September 20, 1985, pp. 31, 32 and 34.[1]

This Court has also declined, except in unusual situations, to search for the "real" motive behind a legislature's express purposes when adjudicating constitutional challenges to state statutes. In *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981), the Court stated that

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[1]Appellant now attempts to recast the statements it made before the superior court. Appellant's Brief, p. 14 n. 2. An examination of the September 20, 1985 transcript, however, reveals that the Appellant made such statements because it recognized that it had proven no facts which would authorize the superior court to conclude that the legislature's statement of purpose was anything but legitimate. Regardless of the Appellant's motivation in making its statements before the superior court, those statements clearly constituted a waiver of the arguments Appellant now seeks to assert regarding the General Assembly's motives.

it would "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.' " 449 U.S. at 463 n.7, *quoting Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 n.16 (1975). This Court also affords great weight to the views of the highest court of a state with regard to state law matters, and it customarily accepts the factual findings of such courts in the absence of exceptional circumstances. *324 Liquor Corp. v. Duffy,* 107 S. Ct. 720 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97 (1980). The Georgia Supreme Court specifically based its decision on the superior court's finding that the unchallenged purpose of the Georgia statute—i.e., defraying the increased costs of regulating the importation of intoxicating liquors into Georgia —implicated central concerns of the Twenty-first Amendment. 256 Ga. at 584-85, 351 S.E.2d at 196. In the absence of exceptional circumstances, both the Georgia Supreme Court's findings with respect to the General Assembly's purpose in enacting Georgia's import tax and the legislature's statement of purpose itself are to be given great weight. In light of this, Heublein's failure to develop a record supporting its present contention that the General Assembly's stated purposes were mere pretexts, and Heublein's express waiver in the lower courts of any question regarding legislative purposes, make the questions now presented by Heublein so insubstantial as to warrant no further review.

II. The State of Georgia may constitutionally impose a tax on the importation of alcoholic beverages where the unchallenged purpose of the tax implicates central concerns of the Twenty-first Amendment.

A. The states' power to regulate the importation of alcoholic beverages has been specifically reserved to the states by the Twenty-first Amendment and outweighs the general Commerce Clause principles relied upon by the Appellant in this case.

Appellant's Commerce Clause challenge to the Georgia import tax gives little or no consideration to the powers granted the states by the Twenty-first Amendment. Indeed, the State has never attempted to deny that, but for the Twenty-first Amendment, Georgia's statutes would violate the Commerce Clause. The State's position has always been that, in the context of this case, the Twenty-first Amendment saves the statutes that would otherwise be unconstitutional under a pure Commerce Clause analysis. Specifically, the State has argued, and the Georgia courts have held, that Georgia's import tax implicates central concerns of the Twenty-first Amendment and is consistent with the most recent decisions of this Court regarding the states' authority to regulate intoxicating liquors. *Heublein*, 256 Ga. at 584-85, 351 S.E.2d at 196.

Any discussion of the states' authority to regulate alcoholic beverages must begin with a discussion of the Twenty-first Amendment. *Seagrams & Sons v. Hostetter*, 384 U.S. 35, 41 (1966). The Twenty-first Amendment was ratified on December 5, 1933, and provides in Section 2 that "[t]he transportation or importation into any state, territory, or possession of the United States for delivery

therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., amend. XXI, § 2. The authority thus granted to the states "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." *California Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 107 (1979), *quoting Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). This "considerable regulatory power" has been interpreted as being quite broad, and for more than a quarter century this Court has held that states must be afforded wide latitude in their choice of means to accomplish permissible ends under the Twenty-first Amendment. *California v. LaRue*, 409 U.S. 109, 116 (1972), *citing Seagrams & Sons v. Hostetter*, 384 U.S. 35, 48 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).

The Court's first interpretation of the scope of the Twenty-first Amendment arose in a case quite similar to this one. In *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court considered a Commerce Clause challenge to a California license tax on the privilege of importing beer into the state. In rejecting the constitutional attack, the Court recognized that the right to import without restriction had been "abrogated . . . so far as concerns intoxicating liquors" by the Twenty-first Amendment. *Id.* at 62. More importantly, the Court held that "in the light of history, we cannot say that the imposition of a high license fee for importation may not, like the imposition of the high license fee exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic." *Id.* at 63. Although later decisions

by this Court have qualified the holding in *Young's Market, see, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 330-32 (1964), no decision has held that Twenty-first Amendment considerations *never* take precedence over Commerce Clause restrictions, as Appellant incorrectly urges.

Appellant's argument ignores the historical significance of the Twenty-first Amendment, and is founded almost entirely on the holding of a sharply-divided Court in the case of *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984). Appellant's broad reading of *Bacchus,* however, is misguided. Although Appellant attempts to liken Georgia's import tax to the tax struck down by this Court in *Bacchus,* it is clear that the taxes are dissimilar in all pertinent respects. The Hawaiian statute in *Bacchus* exempted two local products entirely from the excise tax imposed on all other alcoholic beverages, whether imported or not. 468 U.S. at 265. No tax was imposed on the importing of alcoholic beverages. In fact, the State of Hawaii did not even raise a Twenty-first Amendment issue until the case had reached the Supreme Court. *Id.* at 274 n.12. Instead, the State of Hawaii defended its statutes in the courts below on Commerce Clause grounds, attempting to show that the discrimination in favor of local products was slight and that promoting local industry was a valid legislative purpose. *Id.* at 270.

Hawaii's focus on the Commerce Clause, to the exclusion almost entirely of the Twenty-first Amendment, can be readily understood; the Hawaiian legislature's express purpose in granting the exemption was to promote local industry. The *Bacchus* Court therefore noted, "we

need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry." 468 U.S. at 271. The Court then held that "state laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the state does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry.'" *Id.* at 276. By implication, the *Bacchus* majority acknowledged that a taxing statute otherwise violative of the Commerce Clause can be constitutional where it fulfills a legitimate Twenty-first Amendment purpose.

The Georgia legislation presently under attack, in contrast to the Hawaiian statute struck down in *Bacchus,* specifically addresses concerns central to the Twenty-first Amendment. With the General Assembly's statement of purpose and legislative findings before it, the trial court held that "the State of Georgia does 'seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment,' 52 U.S.L.W. at 4983, and that the legislative findings contained in the Act evince a 'clear concern of the Twenty-first Amendment.' *Id.*" Appellant's Jurisdictional Statement, p. A-19. The trial court also recognized that "it is axiomatic that a state may better police, regulate and control alcoholic beverages produced within its borders than that which is imported from other states, and that a cost differential exists with regard to the control and administration of the vast quantities of alcoholic

beverages imported into this State." Appellant's Jurisdictional Statement, p. A-19. These findings by the trial court were specifically upheld by the Georgia Supreme Court. *Heublein*, 256 Ga. at 584, 351 S.E.2d at 196.

Nevertheless, Appellant relies on *Bacchus* as imposing a major limitation upon a states' right under the Twenty-first Amendment to pass laws affecting the importation of alcohol for delivery or use within its borders. Appellant's position is simply wrong. In *Department of Revenue v. James Beam Co.*, 377 U.S. 341 (1964), this Court reiterated its earlier observation in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964), that "[t]his court made clear in the earlier years following the adoption of the Twenty-first Amendment that by virtue of its provisions a state is wholly unconfined by *traditional* Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." 377 U.S. at 344 (emphasis added). *See also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 681, 712 (1984), *quoting Craig v. Boren*, 429 U.S. 190, 206 (1976) ("[t]his court's decisions have . . . confirmed that the amendment primarily created an exception to the *normal* operation of the Commerce Clause") (emphasis added).

Furthermore, the *Bacchus* Court, in direct contrast to the "strict rule of invalidity" which Appellant asserts here, reiterated that "both the Twenty-first Amendment and the Commerce Clause are parts of the same constitu-

tion and each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Bacchus,* 468 U.S. at 275, *quoting Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 331-32 (1964).

Relying upon the precedents cited above, the Georgia Supreme Court held that "the question for decision in a case in which a liquor law within the ambit of the Twenty-first Amendment is challenged as violating the Commerce Clause is 'whether the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended.' " *Heublein,* 256 Ga. at 584, 351 S.E.2d at 196, *quoting Bacchus Imports, Ltd. v. Dias,* 468 U.S. at 275. The Georgia Supreme Court did not hold, as Appellant contends, that the General Assembly could "pass any law concerning alcoholic beverages no matter how repugnant to other basic constitutional principles." Appellant's Jurisdictional Statement, p. 11. Rather, the court held that a state's interest in offsetting, by taxation, the increased cost of regulating imported alcoholic beverages sufficiently implicates the Twenty-first Amendment so that there is no impermissible violation of the Commerce Clause. Placing a state tax on imported alcoholic beverages to defray the increased costs incurred by the state in regulating such beverages so clearly advances a legitimate Twenty-first Amendment concern that Appellant's attack on the Georgia statutes does not present a substantial question.

B. Since state regulation of alcoholic beverages that incidentally infringes upon purely economic interests merits only the "mildest review" under the Fourteenth Amendment, the Twenty-first Amendment concerns implicated by the challenged legislation provide a sufficient rational basis for sustaining Georgia's import tax against the Appellant's equal protection attack.

The grounds upon which Appellant argues that O.C.G.A. §§ 3-4-60 and 3-6-50 violate the Equal Protection Clause are no more substantial than those upon which Appellant bases its Commerce Clause claim. Appellant cites no equal protection case in which this Court has invalidated a state statute concerning the Twenty-first Amendment and the importation of alcoholic beverages. *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869 (1985), the case upon which Appellant principally relies, involved a state tax on out-of-state insurance companies which was enacted to raise revenue and promote in-state business. *Metropolitan Life,* however, in no way implicated the state's power under the Twenty-first Amendment.

Just as the Twenty-first Amendment permits states to take action with regard to the importation of alcoholic beverages which might otherwise violate the Commerce Clause, so too does it take precedence, under certain circumstances, over the Equal Protection Clause. In *Craig v. Boren,* 429 U.S. 190 (1976), the Court overturned a state statute which allowed females to drink alcoholic beverages at an earlier age than males. The Court reasoned that the gender-based discrimination before it, implicating individual rights, deserved heightened scrutiny and could not withstand such an equal protection analysis. In reach-

ing that decision, however, the Court distinguished situations involving state regulation of alcoholic beverages that incidentally infringes upon purely economic interests, recognizing that cases concerning "purely economic matters . . . traditionally merit only the mildest review under the Fourteenth Amendment." *Id.* at 207.

Because Georgia's import tax incidentally infringes upon economic interests only, the balance struck between the Twenty-first Amendment and the Equal Protection Clause tilts decidedly in favor of the former. As discussed previously, levying a tax on imported alcohol to pay for the increased costs of regulating imported alcohol clearly advances concerns implicated by the Twenty-first Amendment. In the trial court, Appellant waived any argument that this was not the purpose of the tax. As the Georgia Supreme Court correctly held, "the import tax is rationally related to the accomplishment of the legitimate State objective of regulating the importation into the State of intoxicating liquor." 256 Ga. at 585, 351 S.E.2d at 196. Appellant's equal protection claim, therefore, fails to raise a substantial federal question.

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CONCLUSION

A state may impose an import tax on alcoholic beverages imported into that state where the purpose of the tax implicates central concerns of the Twenty-first Amendment. In determining whether a law which would otherwise be invalid under a pure Commerce Clause analysis may nevertheless withstand such an attack by resort to the Twenty-first Amendment, the Court must engage in a "pragmatic effort to harmonize state and federal powers," *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. at 109, and must "reconcile the interests protected by the two constitutional provisions." *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 106 S. Ct. 2080, 2087 (1986). The balancing test to be used in reconciling these interests, as most recently reaffirmed in *324 Liquor Corp. v. Duffy,* 107 S. Ct. 720, 727 (1987), is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capitol Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 714 (1984).

The unchallenged legislative purpose and findings of fact relating to the Georgia statutes in question, as well as the findings of the Georgia courts, evince a clear concern for, and implicate, the central powers reserved to the states by the Twenty-first Amendment. For this reason, Appellees respectfully request that this Court dismiss this appeal for want of a substantial question, or that it affirm the Georgia Supreme Court without further argument.

Respectfully submitted,

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No. 86-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HEUBLEIN, INC., a Connecticut corporation,
Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Appellees.

On Appeal from the Supreme Court of Georgia

APPELLANT'S REPLY BRIEF SUPPORTING JURISDICTIONAL STATEMENT AND OPPOSING MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Appellees' Motion To Dismiss or Affirm Must Be Denied	1
I. This court has subject matter jurisdiction	1
II. An exhaustive factual record is not required when a statute is facially challenged	2
III. The test advanced by Appellees in response to Heublein's constitutional challenge is erroneous	4
Conclusion	8

TABLE OF AUTHORITIES

	PAGE
Cases	
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) .	2,5,6,8
Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080 (1986)	2,3,4,5,8
California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	2,4
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	2,7
Maine v. Taylor, 106 S. Ct. 2440 (1986)	2,3
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	5
324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987) ...	2
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	3
Statutes	
28 U.S.C. § 1257(2)	1,2
Official Code of Ga. Ann. § 3-4-60	7

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On Appeal from the Supreme Court of Georgia

APPELLANT'S REPLY BRIEF SUPPORTING JURISDICTIONAL STATEMENT AND OPPOSING MOTION TO DISMISS OR AFFIRM

APPELLEES' MOTION TO DISMISS OR AFFIRM MUST BE DENIED

I. This Court has subject matter jurisdiction.

The Supreme Court of Georgia upheld state taxing statutes in the face of a challenge that they violate the United States Constitution. Consequently, as Appellees agree, 28 U.S.C.

1 The listing of all parent companies, subsidiaries, and affiliates of Appellant Heublein, Inc. set forth in the Jurisdictional Statement remains currently accurate. *See* Jurisdictional Statement, at *i*.

§1257(2) confers upon this Court jurisdiction to review the judgment of the Supreme Court of Georgia. *See* Motion To Dismiss or Affirm, at 2.

II. An exhaustive factual record is not required when a statute is facially challenged.

Throughout the proceedings below, Appellees persisted in arguing, by way of mischaracterization, that Heublein waived its challenge to the stated purpose of Georgia's facially discriminatory tax statutes. Appellees' Motion To Dismiss or Affirm relies, to the practical exclusion of any other argument, on the notion that this Court must uphold legislation which is constitutionally defective because Heublein did not "[develop a] factual record upon which to base its attack on the General Assembly's stated purpose in enacting Georgia's import tax." Motion To Dismiss or Affirm, at 7. Appellees' argument is a misguided attempt to distort the proper analysis of the questions presented.

Appellees fail to follow the appropriate constitutional principles that apply to Heublein's facial challenge to the Georgia statutes. The evidence that establishes Heublein's claim consists of the terms of the statutes themselves and their legislative history, both of which Heublein presented to the courts below. A party challenging a state statute on its face as violating the United States Constitution does not bear the burden of presenting any other factual basis for the challenge. *See 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

To the contrary, as recently as last Term, this Court held in *Maine v. Taylor*, 106 S. Ct. 2440 (1986), that "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' *the burden falls on the State to demonstrate both that the statute 'serves a*

legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." Id. at 2448 (emphasis added). *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975), cited by Appellees, also supports Heublein's position that the mere recitation of an apparently legitimate purpose will not automatically shield from inquiry the actual purpose underlying a statutory scheme. When, as in the present case, it is apparent from the statutory scheme itself and from its history that the statutory purpose is contrary to the asserted purpose, this Court will examine and itself determine the legitimacy of the purported purpose of discriminatory legislation. *Id.* & n.16.

Repeatedly in the proceedings below, and also in their Motion To Dismiss or Affirm, Appellees concede that "the State has never attempted to deny that, but for the Twenty-first Amendment, Georgia's statutes would violate the Commerce Clause." Motion To Dismiss or Affirm, at 10. Consequently, it is plain that in accordance with *Maine v. Taylor,* the burden in this case falls squarely upon the State to justify the challenged legislation, and not upon Heublein to disprove the asserted justification. That fact notwithstanding, Heublein cited in its Jurisdictional Statement no less than eight references in which it argued throughout the proceedings below that the stated statutory purpose was insufficient to justify the discriminatory legislation. Jurisdictional Statement, at 24. Heublein did not acquiesce in the superior court's contrary decision, but expressly enumerated as error before the Georgia Supreme Court the conclusion that the challenged legislation serves a legitimate purpose. *Id.*

It is the State's lack of any basis to demonstrate how the discrimination can be justified upon which this Court should focus. Nevertheless, the principal argument advanced by Appellees is that this case must be dismissed or affirmed because Heublein waived the right to challenge the purpose of the challenged statutes. Such a position is patently false and misleading; it ignores the very essence of the facial challenge presented by this appeal.

III. The test advanced by Appellees in response to Heublein's constitutional challenge is erroneous.

The test that Appellees ask this Court to apply to the Georgia taxing scheme is: "The State's position has always been that, in the context of this case, the Twenty-first Amendment saves the statutes that would otherwise be unconstitutional under a pure Commerce Clause analysis." Motion To Dismiss or Affirm, at 10.

Stated differently, Appellees urge this Court to adopt the following logic:

1. The Georgia statutes discriminate against interstate commerce;
2. This discrimination is a conceded violation of the Commerce Clause;
3. Because, and only because, section 2 of the Twenty-first Amendment grants states the right to regulate the importation and use of alcoholic beverages, the taxes are constitutional, notwithstanding the admitted Commerce Clause infirmity.[2]

The three-step approach of Appellees is contrary to the teachings of this Court since the adoption of the Twenty-first Amendment, and most particularly, over the past eight years commencing with *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The test espoused by Appellees is one of *per se* validity, under which all liquor legislation would be granted a special immunity from constitutional challenge. Such an approach is fundamentally wrong.

The correct test to be applied in analyzing the challenged statutes is succinctly described by this Court in *Brown-*

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2 The fundamental flaw in Appellees' logic is the assertion that this step must be reached without evaluating and weighing the competing state and federal interests, *i.e.*, without applying the longstanding balancing test. *See* Motion To Dismiss or Affirm, at 10.

Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080, 2084 (1986). Justice Marshall wrote in that case:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

This pronouncement could hardly be more clear. On the one hand, discriminatory state legislation, even in the name of the Twenty-first Amendment, is "virtually *per se* invalid under the Commerce Clause." On the other hand, in those cases when a statute regulates "evenhandedly," a balancing test must be applied. There is no dispute among the parties that the Georgia tax statutes discriminate against interstate commerce and, therefore, the question of their constitutionality is substantial and should be reviewed by this Court in the context of the *Brown-Forman* analysis. Heublein contends that the Georgia statutes cannot survive under either approach.

Next, in support of their Motion To Dismiss or Affirm, Appellees attempt to demonstrate how the present case is distinguishable from *Bacchus Imports, Ltd, v. Dias*, 462 U.S. 263 (1984). Motion To Dismiss or Affirm, at 12-15. First, Appellees point out that the tax in *Bacchus* was an excise tax

and not a tax on imports. This distinction without a difference is illustrative of Appellees' misconception of the constitutional framework this Court has established for evaluating discriminatory legislation. The critical issue is not what a state chooses to call a tax. Rather, the question is whether or not a tax constitutes economic protectionism, and as this Court stated in *Bacchus*: *"[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect."* 468 U.S. at 270 (emphasis added). There is no question in this case but that both the *actual* purpose and the conceded effect of the Georgia statutes is to discriminate against interstate commerce. The fact that the portion of the tax used to effect the discrimination is called an import tax, rather than an excise tax, is wholly immaterial to the required analysis. *See* Jurisdictional Statement, at 4, 5 & n.1.

Appellees also argue that *Bacchus* should not control this case because the stated purpose of the challenged Hawaiian tax was the promotion of local industry. Again, this argument is unpersuasive for two reasons. First, as previously stated, economic protectionism may be found by either a discriminatory purpose *or* effect, and there is no question that the effect of the challenged Georgia taxes is to confer a material competitive advantage upon Georgia producers of alcoholic beverages by requiring importers to pay up to four times the taxes paid by local producers. Therefore, to focus only on the stated purpose of the Hawaii tax at issue in *Bacchus* is yet another example of Appellees' efforts to shift this Court's attention away from reality.

Second, and of paramount importance, the Georgia legislature, in substance, enacted a taxing scheme just as discriminatory as that struck down in *Bacchus,* but Georgia did so with a facade in order to escape this Court's mandates. Since the 1930's, Georgia has employed a taxing scheme that discriminates against out-of-state producers and grants to local producers and producers of alcoholic beverages manufactured from Georgia-grown products a substantial

advantage, protectionist purposes still apparent on the face of the challenged legislation. Official Code of Ga. Ann. § 3-4-60(3).

In response to the *Bacchus* decision, the Georgia legislature repealed its discriminatory tax and created an even-handed system, but just one day later, it repealed the nondiscriminatory legislation in favor of the statutes challenged in this case. In their Motion To Dismiss or Affirm, Appellees totally ignore these facts presented by Heublein. The only notable difference between the statutes here in question and the discriminatory scheme which predated Georgia's "single day of fairness" was the purported purpose clause, which clearly was drafted in an attempt to evade the mandates handed down in *Bacchus*. Appellees, therefore, would have this Court dismiss this appeal or affirm the erroneous decision of the Georgia Supreme Court simply because the drafters of the suspect legislation stated, with no substantiation whatsoever, that it costs more to regulate the importation of alcoholic beverages.[3] By the same reasoning, Appellees apparently would argue that if the Hawaii legislature simply reenacts the discriminatory tax struck down by this Court, but grafts the tax with a new purpose clause like the one in the Georgia legislation, then the outcome in *Bacchus* would be different, notwithstanding the *discriminatory effect* on interstate commerce which would result without regard to the stated purpose. Clearly, such a scenario lacks all credibility.

In short, Heublein places reliance upon the decision in *Bacchus* because it is a clear application of this Court's long-standing decisions on the relationship between the Commerce Clause and the Twenty-first Amendment. The dismissal of this appeal, or the affirmance of the decision of the Georgia Supreme Court, cannot be reconciled with *Bacchus*.

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3 It is also worthy of note that the costs of administering and regulating the importation of alcoholic beverages have never been held to be a core concern of the Twenty-first Amendment. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984).

CONCLUSION

This Court stated in *Bacchus* that "[a] cardinal rule of Commerce Clause jurisprudence is that '[n]o State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." ' " *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 268. Nothing contained in the *Bacchus* decision, or any decision since, has altered this cardinal rule. In fact, as this Court held in *Brown-Forman*, if a state statute discriminates against interstate commerce it is "virtually *per se* invalid." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. at 2084.

Even if a balancing approach is applied to the Georgia taxes, the outcome would not change. The federal interest in preventing discrimination in interstate commerce is so clear and substantial that the stated purpose of the legislation could not be justified. This result becomes even more obvious when viewed in conjunction with the manner in which the legislature created the purpose clause; the fact, evident from the face of the statutes, that no tax increase actually was implemented despite the stated purpose of the need to fund the increased costs of regulating the importation of alcoholic beverages; and the fact, also apparent from the legislation's terms, that the tax dollars generated by the discriminatory taxes are not earmarked to pay for the costs of regulating importation, but rather are relegated to the Georgia general revenue fund for unrelated purposes such as education and public welfare. Furthermore, even if the State of Georgia truly believes that the challenged taxing scheme is justified because it implicates the core concerns of the Twenty-first Amendment, there simply is no authority whatever in support of the notion that those core powers can be utilized in a discriminatory fashion.

Under any approach, the Georgia taxes must fall. Absent such a result, a new rule of *per se* validity will emerge such that any kind of discrimination will prevail so long as the Twenty-first Amendment is in some way invoked. The

Twenty-first Amendment was not adopted to immunize discrimination. It must coexist with the other Amendments and provisions of the United States Constitution and not be utilized to breathe life into a taxing scheme which could not survive scrutiny under such other Amendments and provisions.

For the reasons stated in Heublein's Jurisdictional Statement and in this brief, Appellees' Motion To Dismiss or Affirm must be denied and the decision of the Georgia Supreme Court reversed.

Respectfully submitted,
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AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON } ss.:

Personally appeared before the undersigned officer duly authorized to administer oaths in the state and county aforesaid, JOHN L. SCHAUB, who first being duly sworn, deposes and says as follows:

I am one of the attorneys for Appellant Heublein, Inc. in this matter. I hereby certify that I have this day served the accompanying Appellant's Reply Brief Supporting Jurisdictional Statement and Opposing Motion To Dismiss or Affirm upon each party to this proceeding in the manner prescribed by U.S. Sup. Ct. R. 28.3 at or before the time of filing thereof by depositing three copies thereof in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record for Appellees at his post office address as follows:

State of Georgia, Governor Joe Frank Harris,
Marcus E. Collins, Georgia State Revenue
Commissioner, and
Claude L. Vickers, Director of the Fiscal Division
of the Department of Administrative Services,

through their counsel of record,
Warren R. Calvert, Assistant Attorney General
Georgia Department of Law
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I hereby further certify pursuant to U.S. Sup. Ct. R. 28.5 that all parties required to be served with the accompanying Appellant's Reply Brief Supporting Jurisdictional Statement and Opposing Motion To Dismiss or Affirm, whose names and addresses are set forth above, have been served as set forth herein.

Dated: May 14, 1987.

/s/_____

John L. Schaub

Sworn to and subscribed before me
this 14th day of May, 1987.

/s/_____

Notary Public